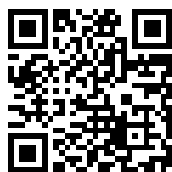
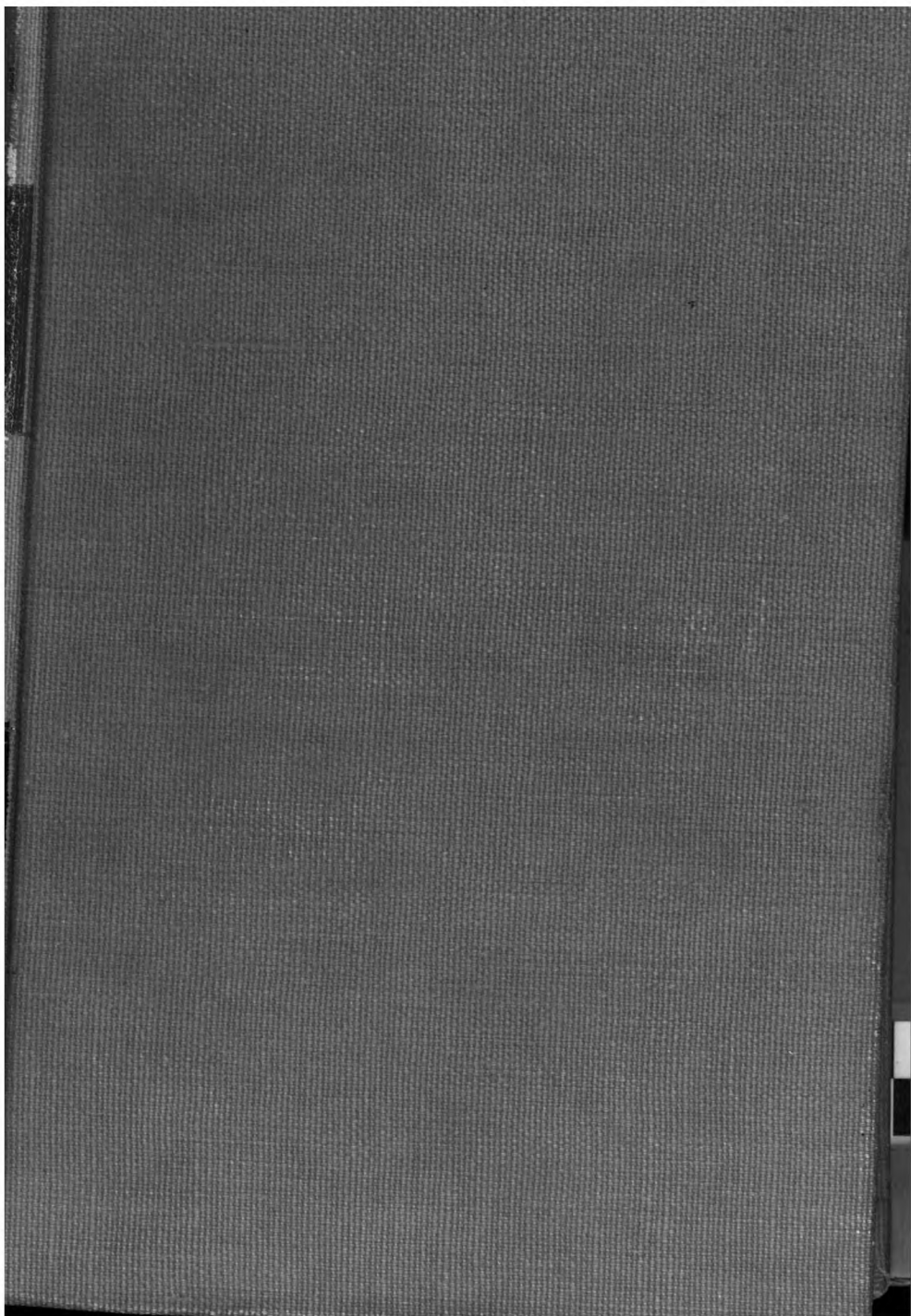

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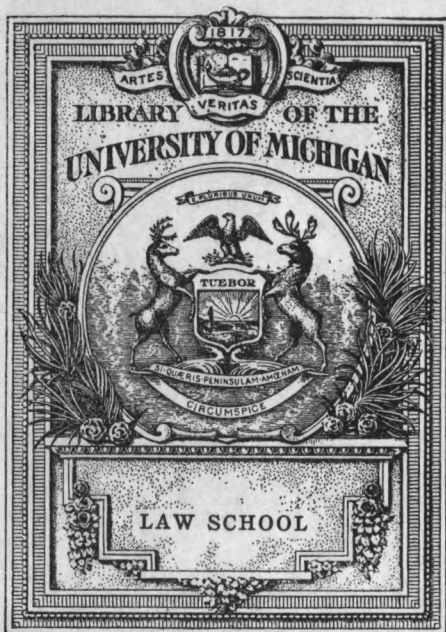
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LETTER
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For Coll Rpts

VOLUME VI.
CONTAINING THE
O P I N I O N S
OF
HON. CALEB CUSHING,
OF MASSACHUSETTS.
FROM MARCH 5, 1853, TO OCTOBER 9, 1854.

OFFICIAL OPINIONS
OF
THE ATTORNEYS GENERAL
OF
THE UNITED STATES,
ADVISING THE
PRESIDENT AND HEADS OF DEPARTMENTS,
IN RELATION TO THEIR OFFICIAL DUTIES,
AND EXPOUNDING THE CONSTITUTION, TREATIES WITH FOREIGN GOVERNMENTS
AND WITH INDIAN TRIBES, AND THE PUBLIC LAWS
OF THE COUNTRY.

15097

EDITED
BY C. C. ANDREWS,
COUNSELLOR AT LAW.

VOLUME VI.

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44

OPINIONS

OF

HON. CALEB CUSHING, OF MASSACHUSETTS:

APPOINTED MARCH 5, 1853.

APPOINTMENT OF ASSISTANT SECRETARY OF STATE.

Appointments, provided for by act of Congress merely in general terms, must be made by the President by and with the advice and consent of the Senate.

ATTORNEY GENERAL'S OFFICE,

March 12, 1853.

SIR: I have considered the question submitted by you,—By whom is to be appointed the Assistant Secretary of State, provided for by the act of Congress of March 3d, 1853, sect. 6, entitled an “Act making appropriations for the Civil and Diplomatic Expenses of the Government,”—and am of opinion as follows:

“The Constitution of the United States (Art. ii., sect. 2) gives to the President power to appoint, by and with the advice and consent of the Senate, all officers of the United States whose appointments are not otherwise therein provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers as they think proper, in the President alone, in the courts of law, or in the Heads of Departments.”

Of course, without there be express enactment to the contrary, applicable to the cases excepted, the appointment of any officer of the United States belongs to the President, by and with the advice and consent of the Senate.

As there is no such express exceptional enactment in the present case, I think the Assistant Secretary of State must be nominated to the Senate by the President.

This conclusion is confirmed by reference to sundry analogous
(1)

 Wyandot Annuities.

enactments. See especially the case of Assistant Secretary of the Treasury, (Act of March 3d, 1849, 30th Congress, ses. 2, ch. 10, and sect. 13), and that of Chief Clerk of the Department of Foreign Affairs, (Act of July 27th, 1789, 1st Congress, ses. 1, ch. 4, section 2,) which appointments are by those acts expressly vested in the respective Heads of Departments.

I have the honor to be, very respectfully, your obedient servant,
C. CUSHING.

Hon. W. L. MARCY,
Secretary of State.

 WYANDOT ANNUITIES.

Investments in behalf of the Indians, provided by treaty to be placed in stocks of the United States bearing interest at five per cent., may, in the absence of any such stock, be invested in stocks bearing interest not less than five per cent., but only stocks of the United States.

ATTORNEY GENERAL'S OFFICE,
March 21, 1853.

SIR: I have considered the memorandum communicated to me by your letter of the 19th inst., and the question therein suggested, and I submit the following opinion thereon:

It appears by the treaty between the United States and the Wyandot Indians, as finally ratified by the President on the 29th of September, 1853, that the United States agreed, among other things, to pay to the said Wyandot tribe of Indians one hundred thousand dollars, to be invested in United States stocks bearing five per cent. interest per annum, which interest shall be paid to them at the time and in the manner in which their present annuities are paid.

It appears further, that, in accordance with the treaty, the stipulated sum was invested in United States five per cent. stocks of the loan of 1843, the only stocks of this class issued by the Government.

And as all the United States stocks of this class are about to be extinguished, they maturing in July next, the question is, what disposition is lawful and proper to be made of the above moneys, held in trust for the Wyandot Indians?

Wyandot Annuities.

In replying to this question, I assume, in the first place, as a settled doctrine of the public law of the United States, that the Indians within our territorial limits are the dependants and subjects of the Government (*The Cherokee Nation v. The State of Georgia*, 1 Peters, 17).

Of course, the Government of the United States has a discretion, qualified only by the general principles of justice, by express agreement, or by act of Congress, in the conduct of its relations with the Indians.

In the present case, there is a stipulation of treaty, by which the United States undertake to hold in trust a certain sum of money for a tribe of Indians, and to invest the same in five per cent. stocks of the United States.

But, in a short time, it becomes impossible to make or to have an investment which shall be in *literal* execution of the undertaking.

It may be doubted whether the words of the treaty are terms of limitation, and the provision one of imperative obligation, and anything more than directory, or by way of exemplification; in which view of the subject, the fund could be disposed of discretionally, according to the interest of the Wyandots and convenience of the United States.

If, however, the language of the treaty be taken as of imperative obligation, then, its literal execution being impossible, it may be lawfully executed *cy pres*, and the investment made in other suitable stock.

Otherwise, one of two alternatives follows, namely: Either no investment, and accordingly no income by means of which to make annual payment to the Wyandots, as otherwise required by the treaty; or else the payment becomes a standing charge on the Treasury of the United States, to be provided for, like other public charges, by annual appropriations on the part of Congress.

I have no doubt, therefore, as to the legal authority of the Secretary of the Interior to invest this fund in other stocks, he taking care to exercise a just and wise discretion in the selection of the same, and making the investment in such time and manner as to provide for the regular payment of the stipulated an-

 Wyandot Annuities.—Military Storekeepers.

nuity, and otherwise to promote the common interests of the Wyandots and of the United States in the premises.

But the stocks purchased must, according to the provisions of an act of Congress now in force, be stock of the United States bearing a rate of interest not less than five per cent. per annum. (v Stat. at Large, p. 464.)

I have the honor to be, very respectfully,

C. CUSHING.

Hon. R. McCLELLAND,
Secretary of the Interior.

 MILITARY STOREKEEPERS.

Military storekeepers are subject to removal from office at the discretion of the President of the United States.

ATTORNEY GENERAL'S OFFICE,
March 26, 1853.

SIR: I have examined the papers transmitted to me with your communication of the 18th instant.

It appears by these documents that Sanders Lansing, Jr., was, in 1851, removed from the office of military storekeeper at Watervliet, and John M. Comstock appointed and commissioned in his place; and Lansing now claims restoration as of right.

The single question presented by the case is, whether military storekeepers are constitutionally subject to removal from office at the discretion of the President.

The character and condition of this class of officers are to be ascertained only by the collation of several acts of Congress.

They originated apparently in the act of April 2d, 1794, which provides for the establishment of military stores, in three or four arsenals with magazines, and the employment of officers to superintend the receiving, safe-keeping, and distribution of the same.

The act of March 3d, 1813, authorizes the Secretary of War to fix and make seasonable allowances for store rent, storage, and salary of storekeepers, necessary for the safe-keeping of all military stores and supplies.

The act of April 24th, 1816, provides that the purchasing

Military Storekeepers.

department of the Army shall have as many military storekeepers as the service may require, whose salaries shall be regulated by the Secretary of War, provided that the pay and emoluments shall not exceed those of a captain of infantry; and by the same act, paymasters and storekeepers are made subject to the rules and articles of war, *in the same manner as commissioned officers*, and all officers of the pay and commissary's department are to be nominated to and confirmed by the Senate, *in the same manner as the officers of the Army*.

The act of July 5th, 1838, provides for the compensation of such ordnance storekeepers as shall be designated as paymasters, which is not to exceed the pay and emoluments of a captain of ordnance.

The act of August 23d, 1842, fixes the salary of military storekeepers, limits the whole number to ten, and makes some other provisions on the subject.

An act of March 3d, 1853, refers to the pay of certain military storekeepers of the ordnance department.

These are the principal provisions of law necessary to be considered. They contemplate, in my opinion, but a single class of officers, by the name of storekeepers, whether of ordnance or of other stores, and whether the duties of paymaster be or be not assigned to them in addition to their specific duties. Being officers, commissioned as such by the President upon nomination to and confirmation by the Senate, subject to the rules and articles of war, and constituting by statute a permanent part of the military establishment, they are entitled to be considered at least as quasi-officers of the Army. So far as regards the question of their legal character, they differ from the proper officers of the pay department chiefly in this, that the latter have, by recent acts of Congress, definite rank assigned to them, which is not the case with military storekeepers. (See act of March 3d, 1847, ch. 61, sec. 13, and act of March 2d, 1849, ch. 81.)

Conceding, however, that military storekeepers are officers, or at least, quasi-officers, of the Army, it does not follow that they are not subject to be deprived of their commission at the will of the President.

I am not aware of any ground of distinction in this respect,

Military Storekeepers.

so far as regards the strict question of law, between officers of the Army and any other officers of the Government. As a general rule, with exception of judicial officers only, they all hold their commissions by the same tenure in this respect. Reasons of a special nature may be deemed to exist, why the rule should not be applied to military, in the same way it is to civil, officers; but the legal applicability to both classes of officers is, it is conceived, the settled construction of the Constitution. It is no answer to this doctrine to say that officers of the Army are subject to be deprived of their commissions by the decision of a court martial. So are civil officers by impeachment. The difference between the two cases is in the form and mode of trial, not in the principle, which leaves unimpaired, in both cases alike, the whole constitutional power of the President.

It seems unnecessary, in this case, to recapitulate in detail the elements of constitutional construction and historical induction, by which this doctrine has been established as the public law of the United States. I observe only that, so far as regards the question of abstract power, I know of nothing essential in the grounds of legal conclusion, which have been so thoroughly explored at different times in respect of civil officers, which does not apply to officers of the Army.

I am of opinion, therefore, that the President had the constitutional power to remove Mr. Lansing from office, and that Mr. Lansing is not entitled to restoration as of right.

If, as would appear from the facts presented, the commission of Mr. Lansing was a local one, as storekeeper at Watervliet, that consideration would serve to make more obvious the power of the President in the given case.

Any other view of the constitutional question would involve the inconvenience of Mr. Lansing and Mr. Comstock being each entitled to the office, in disregard of the provisions of law limiting the number of the officers of this class. For it would not follow, because Mr. Lansing might have been illegally removed, that therefore Mr. Comstock had been illegally appointed; and it would be just as unlawful to remove Mr. Comstock as it had been to remove Mr. Lansing.

If the President should be of opinion that, in regard to officers of this class, it is inexpedient to exercise the constitutional

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power of removal, at discretion, he can, if he see fit, reappoint Mr. Lansing to office as a military storekeeper on the occurrence of any vacancy, without removing Mr. Comstock, to the doing of which the same objections exist, if any, on the general rules of law, as to the removal of Mr. Lansing.

I am, very respectfully,

C. CUSHING.

Hon. JEFFERSON DAVIS,
Secretary of War.

 MILITARY STOREKEEPERS.

Military storekeepers are all of one grade, and alike subject, as to their place of duty, to the orders of the Secretary of War.

ATTORNEY GENERAL'S OFFICE,

March 27, 1853.

SIR: In answer to the inquiry addressed to me in your communication of the 17th instant, I have to state that I concur in the opinion of the Adjutant General that the law makes of military storekeepers but one grade, and that all officers of this class are in law, and should be in the form of the commission, subject, as to place of duty, to the orders of the Secretary of War.

I refer to my opinion of the 26th instant, in the case of Sanders Lansing, Jr., for the premises of this conclusion; and

I am, very respectfully,

C. CUSHING.

Hon. JEFFERSON DAVIS,
Secretary of War.

 THE ARCHIVES OF THE CENSUS BUREAU.

The archives of any Department are not in the possession of the Head of Department, Chief of Bureau, or clerk under either, for the time being, but in the possession of the United States.

Hence, a party cannot, by writ of replevin against such Head of Department or other public officer, take papers from the public archives on the allegation of their being his private property.

Archives of the Census Bureau.—Navy Regulations.

The Secretary of the Treasury, for instance, is in a public building of the United States, where also are certain public archives; but he is no more in possession of the archives, so far as regards a technical question of municipal law, than he is in possession of the building itself.

It is wholly immaterial to the question whether, in the present case, the documents be in a building owned, or only hired, by the United States.

Other technical objections lie to the present process; such as the absence of specific designation of the papers claimed, and a general designation incompatible with the apparent fact. But these are secondary considerations.

I am of opinion that the writ of Mr. Kennedy against Mr. De Bow cannot touch any document existing among the public archives, and therefore in the possession of the United States; that so far as relates to any such document, the writ is a mere nullity, and that it is the right and the duty of the Secretary of the Interior, and of all persons under his authority, to resist by force any attempts, by the writ of replevin or otherwise, to abstract any such document from the archives of the Government.

I have the honor to be, very respectfully,

C. CUSHING.

Hon. ROBERT M'CLELLAND,
Secretary of the Interior.

NAVY REGULATIONS.

Congress is empowered by the Constitution to make rules for the government and regulation of the land and naval forces of the United States.

Provision of statute exists by which the statute regulations of the Army may, within certain limits, be altered by the Secretary of War, but there is no such provision in regard to the statute regulations of the Navy.

The President, and subordinate executive officers, whether military or civil, possess a limited power to establish regulations, provided these be in execution of, and supplemental to, the statutes and statute regulations; but not to repeal or contradict existing statutes or statute regulations, nor to make provisions of a legislative nature.

Hence, the "System of Orders and Instructions" for the Navy, issued by President Fillmore as "Executive of the United States," February 15th, 1858, is without legal validity, and in derogation of the powers of Congress.

Navy Regulations.

ATTORNEY GENERAL'S OFFICE,

April 5, 1853.

SIR: I have reflected on the matter submitted to me in your communication of the 22d of March.

By that communication, and the documents transmitted therewith, it appears, that a code of regulations for the government of the naval service, proposed by the late Secretary of the Navy, with the aid and advice of a board of officers convened for that purpose, and approved by the late President of the United States, was, on the 15th of February last, by a "general order," issued by the President as Executive of the United States, ordered to be adopted and observed in the Navy, and to be regarded and obeyed as the established rules of naval service, until otherwise ordered by the President, or until modified, altered, or repealed by the action of Congress.

I consider and speak of it as "a code of regulations," though denominated, in the general order, "a system of orders and instructions." The title thus given to it in the general order cannot change the nature of the fact. It is divided into forty-six chapters, filling two hundred and twenty-nine printed pages. It defines, among other things, a multiplicity of crimes and offences, with their punishment, and regulates the method of trial in courts martial. It prescribes the duties and relative rank of the officers of the Navy. In a word, it corresponds, in character and contents, to the "General Regulations for the Army."

Some of the particular articles of this "System" may conflict with acts of Congress, and therefore be questionable on specific grounds of law. Others may be such mere instructions of discipline, as to be in themselves free from legal exception. But the serious question in the case appertains to the "System" regarded as a whole, and as general regulation of the Navy; and that question, as put by you, is,—Of the constitutional power of the President, or the Secretary of the Navy, acting by his direction, to adopt and enforce this new code without the authorization of Congress.

The legality of this general order depends on the construction to be given to certain provisions of the Constitution of the United States.

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By one of these provisions, Congress is empowered to raise and support armies, to provide and maintain a navy, and to make rules for the government and regulations of the land and naval forces. (Art. 1, Sec. 8.)

The "System" before me is, it seems to me, neither more nor less than rules for the government and regulation of the naval forces, that precise thing which the Constitution empowers Congress to make.

It does not, however, pretend or profess to have been enacted by Congress.

Nor can the "System" lay claim to legality by virtue of any power delegated to the President by Congress, even if it be conceded, what might well be questioned, that Congress can delegate to others the power to make a law.

An act of Congress, passed the 23d of April, 1800, (ii Stat. at Large, p. 45), prescribed rules and regulations for the government of the Navy of the United States. That act has never been repealed, and those regulations are undoubtedly still in force and operation as law.

An act passed the 7th of February, 1815, (iii Stat. at Large, p. 202), established a board of Navy Commissioners, and authorized the Commissioners to prepare additional regulations, and required these, when approved by the President, to be respected and obeyed until altered or revoked by the same authority, and also to be laid before Congress. A code of regulations was prepared by the Navy Commissioners thus created, commonly called The Blue Book, and published for the government of the naval service; but those regulations cannot justify the present "System," for they were drawn up under special and limited authority, expressly granted by Congress.

That act, providing that the regulations prepared by the Navy Commissioners, when approved by the President, shall be respected and obeyed until altered or revoked by the same authority, has been supposed to justify the "System of Orders," as being the regulations of the Commissioners *altered*; the answer to which is that the act of 1815 was repealed by that of the 31st of August, 1842 (v Stat. at Large, p. 579), and, with its repeal, of course, falls the authority which it vested in the President.

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The next material act of Congress is that of the 19th of May, 1832, which empowered the President to constitute a board of naval officers, to be composed of the Navy Commissioners, or two post captains, whose duty it should be, with the aid and assistance of the Attorney-General, to prepare a new code of rules and regulations for the naval service, which, when approved by the President, *and sanctioned by Congress*, should have the force of law. The present "System" does not pretend to have been prepared and promulgated in accordance with the provisions of this act.

Under the act of May 19th, 1832, (iv Stat. at Large, p. 516), and also under a resolution of the House of Representatives, of the 23d of May, 1842, two successive codes of regulations were prepared, one under the authority of Mr. Paulding, as Secretary of the Navy, and the other by Mr. Upshur, and submitted to Congress; but neither of them was sanctioned by that body, and they remain as historical facts only, and precedents indicating the sense of the Government for the time being, as to the relative powers of Congress and of the President in the matter.

Congress has not conferred on the President general power to make such a code of laws for the government of the Navy. It is not justified by any special provision of law, as we have seen. If, therefore, the "System of Orders and Instructions" has legality, it must be derived, not from an act of Congress, nor through the power expressly given to Congress by the Constitution to make regulations for the government of the naval forces, but from some other provision of the Constitution.

The very peculiar date of the general order, which is "Executive of the United States, February 18th, 1853," would lead to the supposition that the "System" was intended to have legality in virtue of the executive powers vested by the Constitution in the President. A much safer and more plausible ground, on which to claim authority for the general order, would be the power of the President as commander-in-chief of the Army and Navy of the United States.

I do not think the authority assumed in this general order can be justified in either of those ways; and the same arguments in substance apply to both parts of the question.

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On the letter and theory of the Constitution, the President has no separate legislative powers. The Constitution has carefully distinguished the two powers, the executive or administrative, and the legislative, one from the other. The President, whether as Executive of the United States, or as commander-in-chief of the Army and Navy, has no legislative power of himself alone, except in his peculiar legislative relation to, and conjunction with, the two Houses of Congress. But the "System of Orders and Instructions" is, in my judgment, an act in its nature essentially and emphatically legislative, not executive, and, therefore, can have no legality, unless or until sanctioned by Congress, either by previous authorization, or by subsequent enactment, neither of which grounds of legality does it possess.

In conformity with this idea, has been the whole course of legislation from the foundation of the Government, by which the exclusive authority of Congress in this matter has been constantly recognised.

The distinction, which the Constitution makes, between functions legislative and functions executive, is a precious one, and its maintenance is vital to the public liberties. If the President may, by a general order, legislate on a military or a naval question, so may he on any other, and there is an end of all the barriers of the Constitution.

There is another doctrine of constitutional law, which contradicts the assumed authority to make this general order. In this case, a power, expressly given to Congress, is, by a violent stretch of constructive implication, assumed to be transferred to the President.

It will not answer to say that this is the exceptional case of a power, to be exercised provisionally by one branch of the Government, so long as it lies dormant in the hands of the branch to which it properly belongs; for Congress, whether completely or not is immaterial, has, in some degree at any rate, exercised the power, and provided regulations for the government of the Navy.

Nor would it suffice to say, if it were true, that the new "System" is only of matters in addition, and not contradictory, to the regulations heretofore passed by Congress, and still

Navy Regulations.

remaining on the statute book unrepealed. The President can no more enact a law or a modification of law than he can repeal one.

These conclusions in regard to the present "System" are confirmed by the practice of the Government in the analogous case of regulations for the direction of the Army. For that branch of the public service there is permanent provision by an act of Congress passed the 24th of April, 1816, which sanctions the regulations in force under the previous act of the 3d of March, 1813, "subject to such alterations as the Secretary of War may adopt with the approbation of the President." Under this authority it is that the subsisting "Regulations for the Army" have legal effect.

In illustration of which is the fact that regulations for the Army have at different times been submitted to Congress, and either adopted or rejected by that body, so as to show that the practice of the Government in regard to the Army has been the same as in the cognate question of the Navy, namely, to recognise the authority of Congress in the premises, and not to assume the subject-matter as within the scope of the executive power of the President.

It may be proper to observe, by way of illustration, that a similar relation between the powers of the legislative and executive departments of government exists in Great Britain. The Crown does not make regulations either for the Army or Navy unless when expressly authorized by Parliament so to do. (Prendergast, Law relating to Officers of the Navy, pt. i. p. 17.)

In the views thus presented, it is not intended to say that the President, as commander-in-chief of the land and naval forces, has not some power to issue directions and orders. So has a commodore in command of a squadron, or a general in the field. But such orders and directions, when issued by the President, must be within the range of purely executive or administrative action. Cases may be supposed, in which it is not easy to draw the line between what is legislative and what is executive or administrative; and so it is in regard to every such question of the distinction of powers. That possible uncertainty in a given case does not affect the present inquiry,

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concerning which there seems to me to be no uncertainty whatever.

Among the obvious criteria of the true nature of the so-called "System of Orders," which seem to be conclusive as to whether it really is, in constitutional construction, rules for government and regulation, or simply what it professes to be, namely, orders and directions, the following are sufficient to remove all doubt on the subject.

It is, on the face of it, a complete and connected system of "rules for the government of the naval service."

It is true, the question whether a regulation is legislative in its nature, or executive and administrative, is not dependent on the length of the regulation, or the number of its articles. On the other hand, whether an order be of a single paragraph, or of a large volume, is not of itself decisive of its character. But the length, arrangement, and other conditions of a document, may serve as indications, among other things, of the quality of an act, as whether an act of legislation or an act of administration.

No definition of the constitutional term *rules for government and regulation* can be found or made, which will not comprehend this code.

It covers the same precise topics and subjects, and is for the same purpose and object, as the rules and regulations of 1800, those of 1815, and the successive *projets* drawn up by Mr. Paulding and Mr. Upshur. If the act of 1800 is legislation, then so also is the present "System" legislation. On the other hand, if this volume is not, so far as regards the substance, rules for the government of the naval forces, then we have never had any, and the Navy has gone on from the beginning to this day without law.

It comprehends, and has incorporate within it, much of the very matter of the act of Congress of 1800, and therefore is, *pro tanto*, at least, rule or regulation, so far as express enactment by Congress can define what is such. :

If this document be not regulation,—rules for the government of the naval forces,—then it is impossible to conceive what would be regulation: no such thing exists; there is nothing to meet the express call of the Constitution, and the constitutional

Navy Regulations.

provision on the subject is a dead letter. Whoever denies this to be rule—regulation—is bound, if he would sustain the objection, to show what that other and different thing is, which he would admit to be rules for the government and regulation of the naval forces, within the provision of the Constitution.

I have characterized the “System of Orders and Instructions” as a code of laws. It is obviously such in its general frame-work, in its co-ordination of parts, and in what may be considered as the superficial aspect of the document. But a scrutiny of the substance and matter of the “System” and of its internal character, sustains the *prima facie* appearance of the act.

It is a minor fact in this relation, but not unworthy of note, that the regulations for the government of the naval service expressly enacted by Congress, and which are still the only provision on the subject having the constitutional forms and qualities of law, are in a great measure absorbed, and yet are nowhere specifically recognised, in the “System of Orders.” To the contrary of which was the course pursued by the Secretary of War, Mr. Poinsett, in promulgating the “Regulations for the Army,” which refer expressly to the rules enacted by Congress for the government of the Army, and copy them *in extenso* for the information and guidance of whom it may concern. Instead of which, the “System of Orders” suppresses all notice of the paramount rules enacted by Congress, or but obscurely alludes to them in two or three phrases of doubtful import. In effect, the “System of Orders” is what a new act of Congress would be, which should cover the whole ground, adding to, and amending by enlargement, the previous acts of Congress, without mention of them by title or other distinct allusion.

A few examples will suffice, in proof and illustration of the imputed legislative quality of the “System of Orders.”

Thus, in the first chapter of the “System,” we have a classification of the affairs of the Navy into “sea-officers” and “civil-officers,” and it proceeds to define their relative rank, in a manner which may or may not be wise and proper, but which is legislative in all its forms and substance, as distinctly as any

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act of Congress in the statute-book. Nay, in this part of the "System" there is provision, emphatically legislative in its nature, as to the rank of officers of the Navy, in plain conflict with the existing acts of Congress. (See, ex gr., Act of August 31st, 1842, sec. 1. Stat. at Large, vol. v. p. 577.)

So, in the thirty-fifth chapter, articles occur on the subject of courts martial, which are *in pari materia* with provisions of the act of Congress, and are, in effect, abrogatory or emendatory of the same as plainly as a new act of Congress could be.

Again, one of the articles in the same chapter changes the whole theory of judicial procedure, by forbidding the court to receive evidence of the previous good character and former services of the accused in mitigation of the punishment to be awarded. This provision, which is the more observable when compared with another article, which allows evidence to be introduced of previous bad character, may or may not be wise: it is, at any rate, a very positive act of legislation.

Numerous other examples might be given, of specific provisions of the "System of Orders," which are, in every essential quality, acts of general legislation, as clearly and emphatically as any part of the subsisting laws enacted by Congress for the government either of the Navy or the Army.

Some *dicta* occur in the books of law, which speak of the obligatory character of regulations of this class, and which define, with more or less of precision, the limits between what is *regulation* and so legislative, as distinguished from what is *order* and so executive or administrative only. (See, for example, *The United States v. Eliason*, xvi Peters, 291, 302; *De Hart's Courts Martial*, 19.) But the statute applies the term "rules and regulations" indifferently as well to rules prescribed by Congress as to the orders of an executive or military officer. (See Act of March 2d, 1799, s. 11.) And there is no judicial decision or legal authority, which changes the elements of the constitutional question submitted to me.

I am of opinion, therefore, that the "System of Orders and Instructions" under examination, being a code of laws, and an act of legislation, was in derogation as such of the constitutional powers of Congress, and, as the mere act of the Presi-

Navy Regulations.—Appropriation for Albemarle Sound.

dent in a matter not within his executive jurisdiction, is destitute of legal validity or effect.

I am very respectfully,

C. CUSHING.

Hon. JAMES C. DOBBIN,
Secretary of the Navy.

APPROPRIATION FOR ALBEMARLE SOUND.

Where an appropriation was made by Congress expressly for opening or improving a maritime channel by a particular method mentioned,—Held, that the specification is not to be so construed as to defeat or control the general object.

ATTORNEY GENERAL'S OFFICE,

April 11, 1853.

SIR: I have your communication of the 8th instant, in regard to the construction of the provision of the act of August 30th, 1852, making an appropriation to reopen a communication between Albemarle Sound and the Atlantic Ocean.

The words of the statute are: "For reopening a communication between Albemarle Sound, North Carolina, and the Atlantic Ocean, by the construction of a breakwater across Croatan Sound, fifty thousand dollars."

As a general point of statute-construction, I am of opinion, that "the reopening of a communication" is the principal, of which "a breakwater" is but the incident, or a means to an end. The plain sense of the statute is to accomplish the object. The indication of a breakwater as a means is not to have the effect of defeating the main object. Such specification is directory only, not mandatory, still less exclusive of the main object. Of course, the appropriation is to be applied, primarily, to the reopening of a communication, without necessarily including, or necessarily excluding, a breakwater across Croatan Sound.

The particular facts in the present case,—from which it appears that, in the judgment of experts, the breakwater alone would not have the desired effect, but might, on the contrary, serve to exclude the direct means to the proposed end,—may serve to illustrate, by way of example, the propriety of the conclusion of

PARDONING POWER OF THE PRESIDENT.

law here presented ; but the conclusion itself is independent of the particular facts, and rests on a logical analysis of the true legal intentment of the act of Congress.

I am, very respectfully,

C. CUSHING.

Hon. JEFFERSON DAVIS,
Secretary of War.

PARDONING POWER OF THE PRESIDENT.

The President of the United States has the constitutional power to pardon as well before trial and conviction as afterwards ; but it is a power only to be exercised with reserve, and for exceptional considerations.

ATTORNEY GENERAL'S OFFICE,
April 15, 1853.

SIR : I have examined the papers in the case of John Sandford, and respectfully submit the following statement of facts and suggestions on the subject.

At the last January term of the District Court of the United States for the District of New Jersey, Sandford was indicted for the act of purloining a letter, and money contained therein, from the post office at Paterson ; and the indictment stands for trial at the approaching April term of the same District Court.

It appears, from the representation made in behalf of Sandford, that he was a youth employed, at the time of the offence, as a clerk in the post office at Paterson, and left there by the deputy postmaster to perform his duties ; and that, in committing the theft, Sandford yielded, perhaps, to the persuasion of another and older person, as much as to the temptation of opportunity ; in consideration of which extenuating circumstances, and of the respectability of his connexions, he was recommended to the leniency of the Court by the grand jury who found the bill of indictment, and his pardon is now solicited by persons of great worth and credit, including the Governor of the State.

The application, therefore, is for a pardon before trial and conviction. The President of the United States has, undoubtedly, the power to grant a pardon as well before conviction as

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afterwards, because the act of clemency and grace is applied to the crime itself, not to the mere formal proof of the crime by process of law. But there must be satisfactory evidence of some kind as to the guilt of the party. And it has been held unwise and inexpedient, as a general rule, to interpose the pardoning power in anticipation of trial and condemnation, although particular circumstances may exist to justify such an exceptional act on the part of the President. (Mr. Wirt's opinion, March 30th, 1820; Mr. Berrien's opinion, October 12th, 1829; Mr. Taney's opinion, December 28th, 1831.)

In addition to the obvious considerations of public policy and official duty, which seem to dictate reserve in the granting of pardons previous to trial and conviction, is the special fact here, that this application is *ex parte*: whereas it has been usual for the President, before acting on questions of this class, to inquire into the merits of the given case, by means of a report from the proper District Judge or otherwise.

I do not see, on the present occasion, any sufficient reason for departing from the established course in such matters. As the District Judge can have no official knowledge of the case, I recommend that the District Attorney be required to communicate any facts, which, in his opinion, may contribute to inform the conscience of the President in the premises.

I have the honor to be, very respectfully,

C. CUSHING.

The PRESIDENT.

THE ATTORNEY GENERAL AND LOCAL OFFICERS OF THE GOVERNMENT.

It is not the duty of the Attorney General to give advice to local officers of the Government in the Department of the Secretary of the Treasury.

ATTORNEY GENERAL'S OFFICE,

April 20, 1853.

SIR: I have received your communication of the 5th inst., referring to my consideration the letter of James Murray, a Supervising Inspector of Steam Vessels.

That letter propounds a series of nine questions of doubt,

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arising in the mind of Mr. Murray, as to the true construction of the act of 1852, ch. 106, making further provision to secure the lives of passengers on board of vessels propelled in whole or in part by steam, concerning which Mr. Murray desires the advice of the Attorney General, which advice, when given, Mr. Murray proposes to communicate by circular to other Supervising Inspectors for their guidance.

In asking instructions from the Treasury Department, to be by him communicated to other Inspectors, it is obvious that Mr. Murray steps beyond the line of his duty ; for if any such instructions are to be given by the Department, they should proceed directly from itself to all the Supervising Inspectors, as in the case of circulars from the Treasury Department to Collectors, or from the State Department to Consuls, and so in the analogous cases of action by the other departments.

But a more serious objection exists to any reply on my part to the questions propounded by Mr. Murray. I do not perceive that his doubts as to the import of particular provisions of the act of 1852, ch. 106, are matters which concern the Treasury Department, within the sense of the law prescribing the functions of the Attorney General, which make it his duty "to give his advice and opinion upon questions of law, when required by the President of the United States, or when requested by the Heads of any of the Departments, touching any matters which may concern their Departments." If it is the business of the Secretary of the Treasury, either of himself or by reference to the Attorney General, to give legal advice in the premises to Mr. Murray, then it is equally his business to solve all the other current legal doubts of all public functionaries connected with the Treasury Department, and equally the business of all the other Heads of Departments with regard to functionaries dependent on them : the effect of which would be to make the Attorney General the immediate legal guide and adviser of all the local officers of the Government, in all their doubts or controversies, and in all parts of the United States.

No such thing is required of the Heads of Departments by the letter or the spirit of any act of Congress ; nor, of course, is it required of the Attorney General. It is not their duty to

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solve the various hypothetical or prospective legal difficulties, which may occur from day to day, to any and all of the subordinate officers of the Government, in the discharge of their functions under the the acts of Congress. (See Mr. Wirt's opinion, April 11th, 1823.)

If it were made the duty of the Attorney General, through application to the Heads of Departments from such subordinate officers of the Government, to give his opinion upon all such hypothetical questions on acts of Congress, possible to arise, or to be supposed, throughout the United States, it would not be in the power of any single mind to discharge the duties of the office; the Attorney General, thus involved in all the local questions of every local officer in the United States, would cease to be able to give the advice, which he is specifically required by law to give, to the President, and to the Heads of Departments, in regard to the general business of the Government.

Now, it is the settled construction of the functions of the Attorney General, that he has no right to give an official opinion except where it is his duty so to do; and that, in attempting to attach the weight of his office to any opinion not required by law, he transcends the limits of his commission. (Mr. Wirt's opinion, June 12, 1818.) He is sworn to discharge the duties of his office according to law; and he cannot enlarge the sphere of his duties beyond this without violating his official oath. (Mr. Wirt's opinion, Feb. 3d, 1820.)

I therefore respectfully request to be excused from making examination of the several questions propounded by Mr. Murray.

How far it may be proper for the Secretary of the Treasury, or a part of his duty as such, to issue instructions to the Inspectors, affording general exposition of the act of Congress in question, and assuming to prejudge the legal rights of individuals as affected by it, is a matter of inquiry not submitted to me, and to decide which it would not only be necessary to examine the present act, but also to consider what is the constitutional duty of the President in regard to the execution of laws of this nature.

I submit these reflections to your consideration, and should

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be happy to be advised by you if you think there is any error in my conclusions.

I am, very respectfully,

C. CUSHING.

Hon. JAMES GUTHRIE,
Secretary of the Treasury.

DISBURSEMENTS BY ENGINEER OFFICERS.

It is in the discretion of the President whether or not to require bonds of an officer of the Engineer Corps employed as disbursement agent of the Government.

ATTORNEY GENERAL'S OFFICE,
April 20, 1853.

SIR: I have examined the question propounded by you,—Whether an officer of the Corps of Engineers, employed in the superintendence of public works, and intrusted with the disbursement of public money thereon, is absolutely required by law to give bonds in the premises,—and am of opinion that he is not; and that it is a matter within the discretion of the President to require bonds in such case or not, according to his view of the exigencies of the public service.

I am, very respectfully,

C. CUSHING.

Hon. J. DAVIS,
Secretary of War.

RELATION OF THE ATTORNEY GENERAL TO THE SMITHSONIAN INSTITUTION.

The Attorney General is by designation of person a member of the Smithsonian Institution; but it is not his duty individually, and as Attorney General, to give advice to the Regents of that Institution.

ATTORNEY GENERAL'S OFFICE,
April 21, 1853.

GENTLEMEN: I have the honor to acknowledge the reception of your letter of the 19th inst., written in behalf of the Build-

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ing Committee of the Smithsonian Institution, and asking my opinion as to the effect of a certain contract made by the Committee with Gilbert Cameron and another.

It would give me pleasure to answer your inquiry, but for the reasons hereinafter stated.

In repeated instances, it has been decided by my predecessors in office, that the Attorney General of the United States has no right to give an official opinion, except in those cases in which it is required of him by law.

I have considered the subject myself, and have arrived at the same result, the considerations appertaining to the question being, it seems to me, altogether conclusive and unanswerable.

The Attorney General is required by the tenor of his commission and his official oath, to execute the duties of his office according to law.

To step beyond the circle of his duties as thus defined, would in itself be a violation of law, independently of other relations of the subject. (Mr. Wirt's opinions of June 12th, 1818, February 3d, 1820, September 14th, 1822, and April 11th, 1823,—Mr. Berrien's opinion of January 19th, 1830.)

Besides which, it would be to lend the name of the Government to matters of controversy with which it is not connected by law, and would thus involve unauthorized interference with private rights. (Mr. Taney's opinion of July 23d, 1832.)

The general duty of the Attorney General, so far as regards the present subject of inquiry, is to give his advice and opinion upon questions of law, when required by the President of the United States, or when requested in certain defined cases by the Heads of Departments.

As your application is not comprehended in either of these categories, of course it does not appertain to the general duty of the Attorney General.

But the Attorney General of the United States for the time being has, by the act of Congress establishing the Smithsonian Institution, a special *ex officio* relation to the same, which it is, therefore, necessary to look into and understand.

By this act, the President and Vice President of the United States, Secretaries of State, Treasury, War, Navy, the Postmaster and Attorney General, the Chief Justice, and the Com-

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missioner of Patents of the United States, and the Mayor of the city of Washington, during the time for which they shall hold their respective offices, and such other persons as they may elect honorary members, are constituted an establishment by the name of the Smithsonian Institution, with perpetual succession, and with powers and restrictions as otherwise provided by law: which are, specifically, to hold stated and special meetings for the supervision of the affairs of said Institution, and the advice and instruction of the Board of Regents, to whom the law confides the immediate conduct of the business of the Institution.

In my opinion, the only official relation of the Attorney General to the Institution, as above set forth, is that of a member of the establishment or corporation which possesses the function of permanent supervision or visitation of the Board of Regents, and it is not his duty, and therefore it is not his right, nor is it compatible with his specific relation to the Regents as visitor, to give, officially, his individual advice to the Building Committee, upon any question of law arising in the performance of their appropriate official functions.

Permit me, therefore, to beg to be excused from expressing any opinion as to the respective rights of the Building Committee and of Mr. Cameron in the premises.

I am, very respectfully,

C. CUSHING.

Messrs. JOHN W. MAURY,
JOSEPH HENRY.

CONTRACTS FOR THE EXTENSION OF THE CAPITOL.

In general, where the Constitution or an act of Congress requires the President to do a thing which requires the expenditure of money, he may lawfully do it, or contract to have it done, in the absence of any adequate appropriation for the object; and the cost of the thing becomes a lawful charge on the Government.

Where, by the special provision for a particular work commenced and in progress, it was provided that nothing in the act should be so construed as to authorize any officer of the Government to bind the United States by contract beyond the amount of existing appropriation: Held, that, if the public interest required the President to make a contract for the work exceeding

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such amount, he might lawfully do so, subject to the chance of future appropriations for the object, without which the contract would not bind the United States.

A special provision of law enacted that "all contracts now existing," in relation to a given object, "not made according to law, are hereby cancelled." Held, that under this law the President is to judge whether such contracts were made "not according to law;" that the law does not determine this point; and query, whether it could be determined by act of Congress.

ATTORNEY GENERAL'S OFFICE,

May 6, 1853.

SIR: I have considered the question presented by your communication of the 19th ultimo, and that of Captain Meigs accompanying the same.

An act of Congress, passed the 30th of September, 1850, appropriated one hundred thousand dollars "for the extension of the Capitol, according to such plan as may be approved by the President of the United States, to be expended under his direction by such architect as he may appoint to execute the same."

Under this provision of law the President proceeded to adopt a plan of extension, and authorized the making, on the 17th of January, 1852, of a contract for the supply of the marble needed for the extension of the proposed structure, which contract was, on the face of it, and apparently, a lawful exercise of the special power conferred by Congress.

This contract, however, if executed, would involve an expenditure exceeding the amount of the appropriations applicable to the object; for, after the first appropriation of one hundred thousand dollars, no further appropriation was made until the 14th of April, 1852, when, by the joint resolution hereafter considered, a second sum of five hundred thousand dollars was appropriated; and the preliminary inquiry is whether a contract, having such relation to the specific appropriation, was in conflict with the provision of the act of May 1st, 1820 (iii Stat. at Large, p. 568), which enacts that "no contract shall hereafter be made by the Secretary of State, or of the Treasury, or of the Department of War, or of the Navy, except under a law authorizing the same, or under an appropriation adequate to its fulfilment." The answer to this inquiry is,

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that the general prohibition of that act applies only to contracts made by the Secretaries of State, Treasury, War, and Navy, neither of whom was the agent of the contract in question. To be sure, it may be deemed, by construction, to be directory in regard to any contract, made by whatever officer of the Government; but it is, technically considered, mandatory only as to the officers nominated in the act, and the less applicable here, by reason of the fact, that the present contract was made under the direction of the President of the United States, according to authority specially intrusted in his hands, by the act of Congress making the appropriation.

The provisions of the act of 1820 are noticeable in another respect. It does not say merely, that no contract shall be made by the Secretary of State, &c., except under an appropriation adequate to its fulfilment. It assumes and recognises another condition of legality in a contract, namely, a law authorizing the same. That is, a work involving the expenditure of money, may lawfully be done, under this act, even without an adequate appropriation, provided the work itself be authorized by law.

The doctrine may be stated in more general and absolute terms. An appropriation of money by Congress, for a specific object, is an implied authority for the President to do the thing, provided it can be done within the limits of the appropriation; for the mere fact of one appropriation does not necessarily involve the undertaking of Congress to make further appropriation, and of course does not of itself empower the President to engage the Government beyond the specific sum. But when the Constitution of the United States, or any act of Congress, authorizes and requires the President to do a thing, which involves the expenditure of public money, then, and in such case, the legality of an engagement of the President to have the thing done, that is, of a contract for its performance, is wholly independent of the question whether there is, or is not, an adequate appropriation by Congress for the object. This doctrine might be illustrated by examples drawn from affairs both of peace and war. The annual deficiency bills are full of pertinent illustrations of the question as it arises on public acts of a

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continuous nature. But it suffices here to state the position, as one of the very elements of the business of Government.

The material and substantive inquiry here is a more limited one, to wit, of the legal effect of another and a particular provision of law, enacted subsequently to the contract before mentioned, and of its effect as well on that contract as upon a second contract made at a later period.

The provision referred to is by joint resolution of April 14th, 1852, in these words: "Resolved, &c., that there be, and hereby is appropriated, &c., for the period between the passage of this resolution, and the end of the fiscal year terminating June 30th, 1853, five hundred thousand dollars, for the continuance of the work on the two wings of the Capitol; provided that nothing herein contained shall be so construed as to authorize any officer or agent of the United States, to bind the United States, by contract, beyond the amount appropriated by Congress, or to sanction any such contract heretofore made."

Subsequently to the passage of this resolution, namely, on the 12th of July, 1852, a contract was entered into for all the marble work of the extension, according to the plan adopted by the President, with a proviso in the contract, that it shall be subject to the terms and conditions of the joint resolution above cited; and it is to be inferred from the question raised, and appears otherwise, that the ultimate expenditure, involved in the contract, will exceed the amount of money theretofore appropriated for the object by Congress.

This contract, like the preceding one, is in the name of the architect, selected by the President of the United States under the act of the 30th of September; and they are, therefore, each of them, a technical execution of that act.

Now, then, are the contracts, thus made by the President of the United States through the agency of the architect, valid, or are they void by reason of the terms of the joint resolution, or the want otherwise of due authority on the part of the President?

The question may be distinctly stated thus. Had the President of the United States authority, either directly, or through the intervention of some lawful agent, to make one entire contract for the whole work, though to exceed in amount of cost,

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the particular existing appropriation? Or was he bound to make successive and separate partial contracts, within the limits of each appropriation, as it might be needed for the execution of the extension according to the plan adopted?

My opinion is, that the limitation created by the proviso in the joint resolution, is to be understood, not as a limitation of the power of the President to contract, but only as a limitation of his power to *bind the United States, beyond the amount appropriated by Congress.*

It is to be remembered that, by the act of September 30th, 1850, the President was authorized to prescribe the plan of extension, and to commence the work with what, according to the whole course of legislation in matters of this class, and according to the obvious intendment of the act, was but a partial appropriation, to be subsequently enlarged by Congress as occasion should require. This general authority was not taken away by the joint resolution. On the contrary, that resolution impliedly sanctions the plan of the President, and continues the general authority, by making an appropriation "for the extension of the work on the two wings of the Capitol." A third appropriation was made on the 3d of March, 1853, of four hundred thousand dollars, to supply deficiencies, expressly set forth as being "for the extension of the Capitol," and with a proviso in these words: "Provided that so much of former appropriations for the extension of the Capitol, as remains unexpended, and the appropriation now made, or which may hereafter be made for that object, shall be disbursed under such regulations as the President of the United States may prescribe." Here, again, is a distinct recognition of the direct and peculiar relation of the President to the whole undertaking of the extension of the Capitol.

A fourth appropriation of six hundred thousand dollars "for the extension of the United States Capitol," was made also on the 3d of March, 1853. All the successive appropriations, therefore, assume, either expressly or impliedly, a subsisting fact of continuous expenditures for the extension of the Capitol, made, and to be made, under authority specifically given to the President of the United States.

If, now, the President had, as it would clearly seem, a general

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authority under the original provision of law, to contract for the execution of a prescribed plan as a whole, then the question is truly stated above, as being of the tenor and construction of the limitation in the joint resolution of April; and the plain import of the proviso, regarded in the light of the pre-existing facts, and considered in relation to the general authority of the President, is only to take away from him the power to oblige the United States, and make the Government responsible, beyond the particular appropriation, or appropriations, which it might please Congress from time to time to make.

The effect of this proviso is, to reserve to Congress the faculty of making, or of refusing to make, further appropriations, as it may see fit, and to prevent the contractors from setting up any claim for damages as for breach of contract, in case Congress should refuse to make further appropriations.

The contractors enter into contract for the whole work, knowingly, and expressly subject to the discretion of Congress in this respect. They are subject to this by the terms of the act of Congress; and they are subject to it by the clause of the contract, which explicitly recognises the limitation of the act of Congress.

If Congress had intended to restrict the power of the President as to the duration of the contract, or the amount of work to be contracted for, it would have said this. It has not said this, but has only said, that the President shall not bind the United States beyond the amount appropriated by Congress.

I am, therefore, of opinion that the contracts are not invalid, by reason of the proviso in the resolution of April, or of any other relation of the question of the amount of the appropriations; and that, notwithstanding any such objection, the contractors have the right to go on with the works, so far as Congress shall have already made, or shall, hereafter, in its mere discretion choose to make, specific appropriation for the object.

It is nowise material to the conclusion of law, to consider whether the contracts are good or are bad ones as to rates of price and quality of material, unless there be suggestion of such exorbitancy of price, or imperfection of quality, as to raise the question of fraud in the contracts as contracts.

No such suggestion appears, and the subject might be dis-

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missed with what precedes, but for some considerations arising out of the provisions of an act of the 31st of August, 1852.

In that act, as proviso to an appropriation for the completion of the east wing of the Patent Office, there is a series of legislative enactments, some of them general in language and scope, and so provisions of permanent legislation, and these alternating with others, temporary, special, and applicable only to the particular contracts for the extension of the Patent Office, and of the Capitol.

Two of these provisions assume to define in what way the work and material furnished by these contracts are to be measured. Without going into the question, how far it is in the power of Congress to regulate or modify a contract lawfully made by the President of the United States, it is enough here to say that these enactments recognise, as subsisting contracts, the contracts in question for the extension of the Capitol.

Another of these provisions is in the following words, namely: "All contracts now existing in relation to building the additions to the Capitol, as well as the Patent Office, not made according to law, are hereby cancelled, at the end of sixty days, and notice of the same shall be given in all the newspapers of the city of Washington, and all contracts, of every description, which have been made, without public notice having been given, where notice was required, shall be cancelled after sixty days' notice having been given in the newspapers of the city."

I do not deem it necessary here to enter into the grave constitutional question, which these provisions would raise, if they required to be treated as a cancellation by Congress of contracts lawfully made by the President, and contracts otherwise valid—for the provisions are, after all, declaratory merely, first to the effect that all contracts, for any reason, made not according to law, (and therefore void or voidable), shall be advertised after sixty days, as being cancelled; and secondly that all contracts not made according to law, by the specific reason of want of public notice, where notice was required, shall be, in like manner, advertised as cancelled after sixty days. In construing these provisions, and applying them to

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the contracts for the extension of the Capitol, it needs only to inquire whether they were made not according to law, either by omission of requisite notice, or for any other cause. If, for any reason, not made according to law, then they are void, or at least voidable; otherwise they are of complete force and full effect, notwithstanding this act of Congress.

It is presented to me, as one of the facts of the case, that the late President of the United States did not deem these contracts invalid for any cause, and therefore did not advertise them, at the expiration of sixty days, as being cancelled and annulled. Ought the President of the United States now to do this? I think not, because I do not perceive that the contracts are invalid in law; and, unless they be so, it is not the legal right of the President, nor is it the expressed will of Congress, that the contracts be advertised as annulled.

I have already considered and decided the suggestion of illegality, by reason of the relation of the amount of the contract to the amount of the appropriation, and I do not conceive that the President has the right, or is called upon by the act of August, to annul the contracts on this ground of objection. To exhaust the case, I now proceed to show, why it appears to me that the contracts are not invalid for illegality in the omission of notice, and therefore cannot, for this cause, be cancelled by the President.

The words of the proviso are, "All contracts of every description which have been made without public notice having been given, where notice was required, shall be cancelled, &c.;" and the thing to be determined is, whether these contracts are comprehended in this category of the proviso. The objection, as set forth in the evidence taken by a Committee of the Senate of the United States, (Special Session, 1853. Report No. 1, p. 79,) is, that the second of these contracts, "being a private one, is in violation of the law of 1809, in regard to contracts."

The law referred to is the 5th section of the act of March 3d, 1809, "amending the acts for the establishment and regulation of the Treasury, War, and Navy Departments," which provides that "purchases and contracts for supplies or services which are, or may, according to law, be made by or under the direction of either the Secretary of the Treasury, the Secretary

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of War, or the Secretary of the Navy, shall be made either by open purchase, or by previously advertising for proposals respecting the same." (ii Stat. at Large, p. 536.)

Now, in the first place, this act only specifies "purchases or contracts for supplies or services," and it is very doubtful whether the present subject-matter is either supplies or services within the meaning of the act.

In the second place, it is of purchases or contracts made by or under the direction of the Secretary of the Treasury, the Secretary of War, or the Secretary of the Navy, that the act speaks, whereas the present purchase or contract was not made by, or under the direction of, either of the Secretaries named, but by the President, through an architect appointed by him, in manner and form as required by the original act of Congress for the extension of the Capitol.

Thirdly, the conditions of the act of 1809 are two, and alternative; first, *either* open purchase, *or* secondly, contract after previously advertising for proposals. Now, it is in evidence before me, (Report of the Senate Committee, as above, p. 131,) that this contract was made on proposals respecting the same, previously advertised; which fact satisfies one of the alternative conditions of the statute, and so satisfies the statute. As to the other condition of the statute, open purchase, the second condition being satisfied, it is not indispensably requisite to consider of the first, but still the circumstances set forth in the letter of the Secretary of the Interior, (Report, *ubi supra*,) seem to me to contradict the objection of "private contract," and constitute "open purchase," so far as the phrase can be made referable to a contract for the construction of an edifice, or other continuous public work of the Government.

Finally, since the enactment of the proviso of August, and since the refusal or omission of the late President of the United States to advertise the contract as cancelled, Congress itself has, by two separate acts, recognised the contract as being still in force, first, by appropriating four hundred thousand dollars to supply deficiencies on this very contract, and secondly by appropriating six hundred thousand dollars to continue its execution. All the several acts and parts of acts *in pari materia* are to be collated and construed as a consistent whole. Con-

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gress cannot be intended, in this proviso, as declaring the contract void, when, besides recognising the contract as valid by the measurement clauses of the same proviso itself, it subsequently provides for the full execution of the contract.

One other clause of the proviso is too important to be overlooked. It is in these words: "All contracts made without an appropriation of money for an object, the subject of a contract, are hereby cancelled and declared void." If this provision applied to the present contract, it would become necessary, here, also, to inquire into the power of Congress to cancel a contract. But the provision is a general one, and without relation in terms to the contract for the extension of the Capitol. So far as it bears on the present inquiry, it tends to confirm the conclusion arrived at; because, in declaring null any contract, the subject of which has not been the object of appropriation, Congress virtually affirms contracts which are not subject to that exception, and are otherwise of legal validity; and the subject of this contract is in fact one which has been the object of an appropriation by Congress.

On the whole, therefore, assuming the facts to be as presented in the communication of Captain Meigs, and that the only legal exceptions to the contract are those hereinbefore discussed, it is my opinion, that these contracts are valid in law, and that it is not the right of the President, and therefore not his duty, to declare them annulled in compliance with any supposed injunction of Congress.

I am, very respectfully, your obedient servant,

(Signed) C. CUSHING.

HON. JEFFERSON DAVIS,
Secretary of War.

Return of Patent Fees to Caveators.

RETURN OF PATENT FEES TO CAVEATORS.

A caveator is only entitled to return of two-thirds of the fee paid by him into the Patent Office, in case of his acquiescence in the objections of the Commissioner.

ATTORNEY GENERAL'S OFFICE,
June 2, 1853.

SIR : The case from the Patent Office, submitted to my predecessor by the late Secretary of the Interior, and which is recalled to notice by your communication of the 28th ult., presents this question :—

Under what conditions, and in what circumstances, may the caveator withdraw the money, which he pays into the Patent Office on filing his caveat ?

I have collated the sixth, seventh, ninth, and twelfth sections of the act of July 4th, 1836, and the eighth, twelfth, and sixteenth sections of the act of March 3d, 1837, which particularly bear on the subject ; and on consideration of which the question may be re-stated more definitely, thus :

When a caveator, who, having proceeded to file his description, specifications, drawings, and model, and paid the ten dollars required by the statute, in addition to the twenty paid on filing the caveat, persists in his right to have a patent, but fails to obtain it, is he entitled to demand a return of the twenty dollars ?

I do not think there is any reasonable cause of doubt as to the construction of the statute in this relation.

A caveator is an applicant for a patent, who sets forth the design, purpose, and distinguishing characteristics of his invention, and prays protection against others until he shall have matured it ; and he is allowed one year in which to complete and file his specifications, drawings, and model, or, in case of adverse application by another person within the year, then three months from the time of notice of such other application.

No person but a citizen of the United States, or an alien who shall have been a resident of the United States one year next preceding, and shall have made oath of his intention to become a citizen, is entitled, by a caveat after filing his application for

Return of Patent Fees to Caveators.

a patent, to gain further time to perfect his invention and file his specifications, drawings, and model.

But all applicants, whether citizens of the United States, aliens who have taken the oath of intending to become citizens of the United States, or aliens who have not made such oath, and whether unconditional applicants for a patent or only applicants by caveat, are comprehended by the provisions of the seventh section of the act of 1836, and the twelfth section of the act of 1837, so far as regards the election therein given to them, in case the Commissioner of Patents shall, on examination, make known objections to the issue of a patent. In every case, if the applicant shall elect to withdraw his application, relinquishing his claim to the model, he shall be entitled to receive back twenty dollars, part of the duty required by the act of 1838, or two-thirds of the duty according to the act of 1837, on filing a notice in writing of such election in the Patent Office. These are, therefore, the legal conditions precedent of a right to demand a return of the twenty dollars, namely, acquiescence in the objections of the Commissioner of Patents to the issue of a patent, relinquishment of the model, and notice in writing of such election filed at the Patent Office.

If, on the other hand, the applicant persists in his application, notwithstanding the objection of the Commissioner, pursues the forms of appeal authorized by statute, and yet fails after all to obtain a patent, he has no claim to a return of twenty dollars. The right to that return is absolutely dependent on his acquiescence in the objections of the Commissioner.

There is no difference in the acts, so far as regards the question of a return of the twenty dollars, between the applicant who has filed a caveat in order to obtain time to perfect his invention, and an applicant who proceeds without a caveat.

An applicant who has filed a caveat, to be entitled to claim rightfully a return of the twenty dollars, two-thirds of the duty he had paid, must, in case the decision of the Commissioner be adverse to him, acquiesce therein without appeal, elect to withdraw his application, relinquish the model, and file the proper notice in the Patent Office. By appealing to a Board of Examiners, the caveator, in common with every other appli-

 Appeals in Patent Cases.

cant, who does not elect to acquiesce and withdraw his application, foregoes all right to any part of the duty paid.

These conditions of the seventh section of the act of 1836 apply to all persons, whether applicants by specification and so forth complete at the outset, or applicants by application incomplete and with caveat for their benefit in gaining time, and whether citizens of the United States, aliens having resided one year and made the oath of intention to become a citizen, or others, the subjects of any foreign government.

I have the honor to be, your obedient servant,

C. CUSHING.

Hon. ROBERT McCLELLAND,
Secretary of Interior.

APPEALS IN PATENT CASES.

An act of Congress allowed appeals in certain cases from the decision of the Chief Judge of the Circuit Court of the District of Columbia; and a subsequent act, without taking away that power, extended the right of appeal so as to lie to either of the Assistant Judges. Held, that an order of the Commissioner requiring, on account of the infirmity of the Chief Judge, that appeals be admitted only to the Assistant Judges, is contrary to law, and without effective operation.

ATTORNEY GENERAL'S OFFICE,

June 2, 1853.

SIR: I have considered the question of the Commissioner of Patents, submitted to me by your letter of the 21st of May, as to the validity of the orders of the late Commissioner, of the 5th of March last, concerning appeals to the judges of the Circuit Court of the District of Columbia.

The act of Congress of the 4th of July, 1836, sec. 7 and 8, (v Stat. at Large, 120,) allows applicants for patents to appeal from the decisions of the Commissioner to a Board of Examiners.

By the act of March 3d, 1839, sec. ii, (v Stat. at Large, 354,) in all cases where an appeal was allowed by the former law to Examiners, the party may, instead thereof, appeal "to the Chief Justice of the District of Columbia, whose duty it is made, in

Appeals in Patent Cases.

that case, to hear and determine the same summarily on the evidence produced before the Commissioner.

An additional act, passed August 30th, 1852, provides that appeals authorized by the preceding act "may also be made to either of the Assistant Judges of the Circuit Court of the District of Columbia," with the same powers as had been previously conferred on "the Chief Justice;" and it further provides that "in case appeals shall be made to the said Chief Judge or either of said Assistant Judges, the Commissioner of Patents shall pay said Chief Judge or Assistant Judge the sum of twenty-five dollars," required by law of the appellant in such appeal.

Now, it is obvious that the act of 1852 does in no sense take away the jurisdiction of the Chief Justice. On the contrary, in conferring concurrent jurisdiction on each of the other Justices, it expressly and repeatedly recognises the same jurisdiction as remaining in the Chief Justice.

Notwithstanding which, the late Commissioner of Patents, by the orders referred, undertook to require and order, in all cases of interfering patents, that the appellant, who shall have theretofore taken an appeal to the Chief Justice, shall, within fifteen days after notice of the order, amend his appeal by taking it to one of the Assistant Judges, and, on his neglect so to amend, that a patent shall issue to the appellee; and that thereafter all appeals shall be taken to one of the Assistant Judges, or else a patent shall issue to the adverse party.

I conceive these orders to be in plain violation of law. The Commissioner has assumed to enact a statute, repealing an act of Congress.

The reason for this assumption, which the Commissioner alleges, namely, the infirmity of the Chief Justice, existed before the enactment of the act of 1852, and was known to Congress, because it induced this very enactment; and yet Congress saw fit to leave unimpaired the jurisdiction of the Chief Justice; and the power to appeal to him, given by Congress, cannot be taken away by the Commissioner.

I perceive the inconvenience involved in the fact, that the party, against whom the Commissioner has decided in a case of

Contract with Grandison Spratt for Hemp.

interference, may, by an appeal to the Chief Justice, while he, by infirmity, is unable to hear and determine, purposely delay and obstruct the final decision of the case in favor of the rightful claimant to a patent, and thus injustice be done. But Congress, and Congress alone, has, in my opinion, power to remedy the evil; and the mere defect of the law cannot authorize its repeal by the Commissioner.

I have the honor to be, your obedient servant,

C. CUSHING.

Hon. R. McCLELLAND,

Secretary of Interior.

CONTRACT WITH GRANDISON SPRATT FOR HEMP.

A provision of statute empowered the Secretary of the Navy to make a contract on time for the supply of American water-rotted hemp, but the power was not executed. A subsequent provision contained appropriation for the object, but required purchase in open market. Held, that the latter provision so far repealed the former, that a contract on time for this object, afterwards made by the Secretary of the Navy, was void for want of power.

ATTORNEY GENERAL'S OFFICE,

June 3, 1853.

SIR: The contract, referred to me by your communication of the 31st ult., which was made on the 21st of February, 1853, between the United States and Grandison Spratt, to supply the Government with American water-rotted hemp for the use of the Navy, or to deliver in place of it, Russian hemp, at an agreed price for the period of five years, seems to me unsupported by legal authority and in violation of the express prohibition of acts of Congress.

There is, it is true, a joint resolution of the 19th of May, 1848, which authorizes the Secretary of the Navy, if in his opinion it will be advantageous to the public interest, to make contracts for any term not exceeding five years, for the purchase of American water-rotted hemp for the use of the Navy of the United States, provided the same can be had of equal quality with the best foreign hemp, and at a price not exceeding the average price of the last five years.

Contract with Grandison Spratt for Hemp.

It does not appear whether or not the contract with Spratt conforms to this resolution in point of price, which it must do in order to be valid under it. I presume, however, the contract was intended so to do. But this would now be immaterial. For, after the resolution had remained dormant for a series of years, and it being doubtful, indeed, whether it could at a subsequent year be acted on, the authority, which it had given the Secretary of the Navy, was taken away by most unequivocal provisions of successive acts of Congress.

In the act making appropriations for the naval service, of September 26th, 1850, (ix Stat. at Large, 513,) there is an appropriation for sundry objects, including "the purchase of American water-rotted hemp, to be bought by the Secretary of the Navy in open market;" and in the naval appropriation of the next year, the language is yet more emphatic, it being—"Provided that the Secretary of the Navy shall hereafter purchase for the use of the Navy, in open market, if to be procured, American hemp of a quality equal to the best foreign article." (ix Stat. at Large, 621.)

The words of the act of Congress—"the Secretary of the Navy shall hereafter purchase, for the use of the Navy, in open market,"—are general, and look to all future time. They constitute permanent legislation. It is no answer to the force of the terms employed, to say that they are found in an act making appropriations, and stand as a proviso to a specific annual appropriation. Very much of the permanent legislation of the country, especially of late years, comes to us in the same form, but is not the less the constitutional action of Congress, and obligatory in all the permanent legal relations of the Government.

The joint resolution and the proviso in the appropriation act are *in pari materia*; they are contradictory and repugnant; each excludes the other; a contract for supply of hemp annually for five years, and supply by purchase in open market, are different terms, different things, and so contrary in the very matter, that they cannot be reconciled.

Consequently, the two provisions, when collated, constitute one of the clearest cases of repeal by implication through their irreconcilable repugnancy; and the joint resolution being ante-

Principal Clerks of the General Land Office.

rior in date, must be held as repealed, according to the maxim,—
"Leges posteriores priores contrarias abrogant." (Dwarris on
Stat. 530.)

I am of opinion, therefore, that the contract in question was
not only unauthorized by law, but in violation of it, and that it
is not binding on the United States.

I have the honor to be, very respectfully,

C. CUSHING.

HON. J. C. DOBBIN,
Secretary of Navy.

PRINCIPAL CLERKS OF THE GENERAL LAND OFFICE.

A provision of statute in terms authorizes the appointment, with consent of
the Senate, of three "Principal Clerks" of specific designation of positions:
Held, that this provision was not repealed by a subsequent act for dividing
Clerks of the several Departments into classes upon examination.

ATTORNEY GENERAL'S OFFICE,

June 10, 1853.

SIR: I have duly considered the question submitted to me by
your communication of the 6th inst., regarding the late provi-
sions of law for the re-arrangement of the Clerks in the several
Departments, in the relation thereof to the act re-organizing
the General Land Office.

That act, passed July 4th, 1836, (v Stat. at Large, 107,) pro-
vides, in section 1st, for the appointment of a Commissioner.

Section 2d authorizes the President, by and with the advice
and consent of the Senate, to appoint two subordinate officers,
the one to be called "Principal Clerk of the Public Lands,"
and the other "Principal Clerk on Private Land Claims," each
with a salary of \$1800 per annum. (Sec. 10.)

Sec. 3d authorizes the President to appoint, by and with
the advice and consent of the Senate, an officer to be styled the
"Principal Clerk of the Surveys," whose duty it shall be to
direct and superintend the making of surveys, the returns
thereof, and all matters relating thereto, which are done through
the offices of the Surveyor General. His annual salary is also
\$1800. (Sec. 10.)

Principal Clerks of the General Land Office.

Sec. 4th authorizes the President to appoint, by and with the advice and consent of the Senate, a "Recorder of the General Land Office," whose duty it shall be "to certify and affix the seal of the General Land Office to all patents for public lands; and he shall attend to the correct engrossing and recording, and transmission of such patents. He shall prepare alphabetical indexes," and "he shall prepare such copies and exemplification of matters on file or recorded, as the Commissioner shall from time to time direct." His salary is \$1500 per annum. (Sec. 10.)

By section 2d,—“In case of vacancy in the office of the Commissioner of the General Land Office, or in the absence or sickness of the Commissioner, the duties of said office shall be devolved upon, and be performed ad interim by, the Principal Clerk of the Public Lands.”

By section 8th,—“Whenever the office of Recorder shall become vacant, or in case of sickness or absence of the Recorder, the duties of his office shall be performed, ad interim, by the Principal Clerk on Private Land Claims.”

Besides these officers, the "Recorder," and particular clerks called "Principal Clerk of the Public Lands," "Principal Clerk on Private Land Claims," and "Principal Clerk of Surveys," to be appointed by the President by and with the advice and consent of the Senate, the Commissioner of the General Land Office (by section 10 of said act) "was authorized to employ for the service of the General Land Office," a great number of Clerks whose duties are not specially defined, but such as should be assigned to them respectively by the Commissioner, and whose numbers and salaries are of six classes, of \$1500, \$1400, \$1300, \$1200, \$1100, and \$1000 each; besides one draughtsman at an annual salary of \$1500, an assistant draughtsman at an annual salary of \$1200, with messengers, assistant messengers, and packers.

By section 11th, such provisions of the act of April 25th, 1812, for the establishment of the General Land Office in the Department of the Treasury, and of all acts amendatory thereof as are inconsistent with this act, "are hereby repealed."

Principal Clerks of the General Land Office.

The act making appropriations for the civil and diplomatic expenses of Government, approved 3d March, 1853, in section 3d, (Sess. Acts, p. 209,) directs that from and after 30th June, 1853, "the clerks in the Departments of Treasury, War, Navy, the Interior, and the Post Office, shall be arranged into four classes, of which class number one shall receive an annual salary of \$900 each, class number two \$1200 each, class number three \$1500 each, and class number four \$1800 each. * * *

"In the office of the Commissioner of the General Land Office, forty of class one, forty of class two, twenty-three of class three, and three of class four. * * *

"And there shall be a Chief Clerk for each of the offices of the Solicitor, First Comptroller, Second Comptroller, the Sixth Auditors, Register, Commissioner of Customs, Treasurer, Light House Board, Commissioner of Pensions, Commissioner of the General Land Office, Commissioner of Patents, and Commissioner of Indian Affairs, who shall be allowed an annual salary of \$2000 each.

"And there shall be a Chief Clerk of each of the Departments of the Treasury, War, Navy, Interior, and General Post Office, who shall be allowed an annual compensation of \$2200 each.

"No clerk shall be appointed to either of the four classes until after he shall have been examined and found qualified by a board to consist of three Examiners, one of them to be the Chief of the Bureau or office into which he is to be appointed, and the two others to be selected by the head of the Department to which said clerk will be assigned." * * *

Disbursing clerks to be appointed out of class four by the heads of the respective departments.

"Provided that the clerks when distributed and arranged as required by this section, shall be paid according to its provisions, * * * and shall constitute the whole of the permanent clerical force of the Departments of the Treasury, War, Navy, the Interior, and the Post Office, with the exception of the Census Bureau, * * and the clerks *temporarily* employed in the office of the third Auditor on Bounty Land Service and on arrearages of Pay.

Principal Clerks of the General Land Office.

"And provided further that each head of the said Departments may alter the distribution herein made of the clerks amongst the various bureaux and offices in his Department, if he should find it necessary and proper so to do."

Upon these provisions of the statutes of 1836 and 1853, the question presented is :

"Whether the three clerks of the fourth class, assigned by the act of 1853 to the General Land Office, are in addition to the three officers now there at the same amount of compensation?"

This question may be answered satisfactorily by having recourse to some of the well established rules of construction.

"Every statute ought to be expounded, not according to the letter, but according to the meaning: Qui hæret in litera, hæret in cortice; the letter of the law is the body; the sense and reason of the law is the soul." (Plowd. 467, *Eyston v. Studd.*)

In construing statutes, all the parts ought to be taken together as one whole, and not one part only by itself; and such construction ought to be made as will best answer the meaning and intention which the makers of the law had in view. (*Dwarris on Statutes*, 552; *Lincoln College's Case*, iii *Coke*, 596; *Stradling v. Morgan*, Plowd. 205; *Magdalen College Case*, xi *Coke* 73 b; *Co. Litt.* 381 a & b; iv *Bac. Ab. Statute* (ii.) pl. 38, p. 447.)

A subsequent statute, in which there is no repealing clause, shall not, by implication, work a repeal of a previous statute, further than the later statute is indisputably contradictory to the former "in the very matter," so that the two cannot be reconciled; but when there are two statutes, "the one in appearance crossing the other, but no clause of repeal is contained in the later statute, then, in so far as the one may stand with the other, the exposition should be that both should stand in force." (*Weston's Case*, iii *Dyer*, 347 b; *Foster's Case*, ii *Coke*, 61 and 63; *Dwarris on Statutes*, 531.)

A later statute, in the affirmative and general, shall not take away a former act, which is particular and special. (*Gregory's Case*, vi *Coke*, 19; *Williams v. Pritchard*, 4 *Durnford*

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& East, p. 3; *Eddington v. Borman*, 4 Durnford & East, p. 5; *Dwarris on Statutes*, 514.

It will be perceived, on applying these rules of construction to the two statutes of 1836 and 1853, that so much of the tenth section of the act of 1836 as authorized the Commissioner of the General Land Office to employ, for the general service of the Land Office, clerks, whose duties were not specified in that act, and who were to be arranged by him in classes, and numbers in each class, with annual salaries ranging from "not exceeding \$1500 each," down to "not exceeding \$1000 each," is repealed by the act of 1853, requiring the clerks to be arranged into four classes, with salaries ranging from \$900 to \$1800 to each clerk per year, such appointment to either of the four classes not to be made until after the clerk shall have been examined and found qualified by the board of three examiners to be appointed in manner provided in the act.

But nothing in the act of 1853 seems to me to warrant a conclusion, that Congress intended that those Principal Clerks, "of the Public Lands," "on Private Land Claims," and "of the Surveys," whose offices are specially and particularly created, and who are to be appointed by the President by and with the advice and consent of the Senate, should be subjected to the examination of the board of three examiners, and arranged into one or the other of the four classes. The second and third sections of the act of 1836, relating to the offices and appointments of "Principal Clerk of Public Lands," and "Principal Clerk on Private Land Claims," and the "Principal Clerk of the Surveys;" and so much of the tenth section thereof, as fixes the annual salaries of those officers, as well as the other provisions of sections second and eighth, devolving the duties of the Commissioner of the General Land Office, or of the Recorder, on the "Principal Clerk of the Public Lands," or on the "Principal Clerk on Private Land Claims," respectively, on the contingencies, mentioned in the said second and eighth sections of the act of 1836, may well stand and comport with the provisions of the act of 1853, in relation to the classifications and salaries of the other clerks therein alluded to, and so those provisions of the act of 1836 not be taken as repealed by any reasonable or plausible implication arising out

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Principal Clerks of the General Land Office.

of the act of 1853, nor the maxim—"Leges posteriores priores contrarias abrogant,"—be rightfully applied to this case.

The proviso, "that the clerks, when *distributed and arranged* as required by this section, shall *be paid* according to its provisions, * * * and shall constitute the whole of the permanent clerical force of the departments," was intended to prohibit the employment of clerks, beyond the numbers authorized by the statutes, with duties unknown to, and salaries not fixed by, the statutes, and with employments and compensations created solely by the executive will. It was also intended to forbid the curtailment of the salary of one clerk to increase the compensation of another. But it was not intended to diminish the number, nor the salaries, of clerkships established by law. Nor did it mean to cut off the chief clerks for each of the bureaus at an annual compensation of \$2000 each, nor the chief clerks for each of the departments at an annual compensation of \$2200 each, mentioned in the sentence immediately preceding; nor any other offices established by any other statute, with duties defined and salaries fixed by the statute, the officers whereof are to be appointed by the President, by and with the advice and consent of the Senate.

What clerks, "when distributed and arranged as required by this section, * * * shall constitute the whole of the permanent clerical force of the departments," will be the better understood on looking at the proviso immediately succeeding: "That each head of the said departments may alter the distribution herein made of clerks amongst the various bureaus and offices in his department, if he should find it necessary and proper so to do." The limitation of "the whole of the permanent clerical force of the departments," is confined to, and does not extend beyond, nor mean to circumscribe, any clerks, but such as are to be arranged and distributed into the four classes; and those four classes are to comprise such clerks only as that each head of the said department may alter that distribution "amongst the various bureaus and offices in his department."

It is manifest that Congress cannot, in the exercise of any power given it by the Constitution, confer upon the head of a department authority to review, reverse, and annul an

Principal Clerks of the General Land Office.

appointment to office, made in pursuance of law, by the President, by and with the advice and consent of the Senate of the United States; nor authority to transpose from one office to another, nor from one salary to another, any clerk or other officer, whom the President, by and with the advice and consent of the Senate, has appointed to a particular office, with a salary fixed by law to such office: which would be, in effect, to annul the appointment made by the President, by and with the advice and consent of the Senate, and to put in the vacant place, at the discretion of the head of a department, another person, without any nomination by the President, and without the advice and consent of the Senate. Yet, such are the consequences, if the act of 1853 be construed so as to require that clerks, appointable by the President, by and with the advice and consent of the Senate, to particular offices, with salaries established by statute, shall be arranged into the one or the other of the four classes. A construction of the statute of 1853, which would impute to the legislature such an intention, and involve the act itself in such absurd consequences, in violation of the Constitution, cannot be admitted.

The fair and just construction of the third section of this act of 3d March, 1853, is not inconsistent with, and does not repeal, any of the general enactments of the act of 4th July, 1836, except that part of the tenth section, which authorized the Commissioner of the General Land Office to appoint one clerk at an annual salary not exceeding \$1500; four clerks at an annual salary not exceeding \$1400 each; sixteen clerks, whose annual salary shall not exceed \$1300 each; twenty clerks, at an annual salary not exceeding \$1200 each; five clerks at an annual salary not exceeding \$1100 each; and thirty-five clerks at an annual salary not exceeding \$1000 each.

The draughtsmen, messengers, assistant messengers, and packers, mentioned in the tenth section of the act of July 4th, 1836, are of employments not repealed by the act of 1853.

The three clerks of the fourth class allowed to the General Land Office by the third section of the act of 1853, are, in my opinion, in addition to the three officers of Principal Clerk of the Public Lands, Principal Clerk on Private Land Claims, and

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Principal Clerk of the Surveys, as authorized by the act reorganizing the General Land office.

I have the honor to be, very respectfully,

C. CUSHING.

Hon. R. McCLELLAND,
Secretary of Interior.

CONTRACTS OF THE POTAWATOMIE INDIANS.

All executory contracts of individual Indians for the payment of money or fees are null by statute, but not of necessity the executory contracts of a nation or tribe of Indians.

The President may or not in his discretion recognise the pecuniary engagements of a tribe of Indians.

The President will examine into all such contracts, and confirm them or not according to what appears the legality and sufficiency of their consideration, and of their relation to the interests of the Indians.

ATTORNEY GENERAL'S OFFICE,

June 13, 1853.

SIR: I have held under advisement for some time, your communication of the 16th of March, partly because of the particular circumstances under which the question comes before me, and partly because it involves the examination of sundry acts of Congress, of a series of treaties with the Potawatomes, and of the general policy of the United States towards the Indians.

It appears that, in the year 1851, the chiefs, warriors, and principal headmen of the Potawatomie Indians, in council assembled, assumed certain debts, due from individuals of the nation to Thomas D. S. McDowell and others, promised to pay the same out of the first national annuities due from the United States, and requested the President to pay the same to the several creditors by name, assigning for reason that they had received no annuity for a period of eighteen months, and were, therefore, compelled to call on their traders to furnish the provisions and clothing, for which the original debts were contracted, and without which they would have suffered greatly.

The United States' Agent certifies that it was the unanimous voice of the council thus to assume the individual debts and con-

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solidate them into a national one, and that the whole was done in good faith.

Upon these facts, the inquiry addressed to me is,—Whether the act of Congress of March 3d, 1847, does not preclude the payment of these obligations by the United States.

It appears that the late Commissioner of Indian Affairs allowed these obligations, and that the late Secretary of the Interior approved the allowance, and ordered payment accordingly; but the Second Auditor, to whom the accounts were referred by the Second Comptroller, declined to certify them without further instructions. I have no occasion, however, to say anything as to this part of the case, or the inquiries it might suggest as to previous action of the late President of the United States, in the premises, or of the late Secretary of the Interior and Attorney General, or of the accounting and auditing officers of the Treasury, being expressly excused therefrom by the terms of your communication. I proceed, therefore, to consider the naked question of the bearing of the act of 1847 on these obligations.

The act of 1847, which is most directly in question, is in amendment of another on the same subject, and the two acts need therefore to be collated and examined together.

By the act of June 30th, 1834, entitled an act to provide for the organization of the Department of Indian Affairs, (iv Stat. at Large, 735,) it is enacted as follows:

“Sec. 2. That the payment of all annuities or other sums stipulated by treaty to be made to any Indian tribe, shall be made to the chiefs of such tribe, or to such person as said tribe shall appoint; or if any tribe shall appropriate their annuities to the purpose of education, or to any other specific use, then to such person or persons as such tribe shall designate.

“Sec. 12. * * That it shall be lawful for the President of the United States, at the request of any Indian tribe, to which any annuity shall be payable in money, to cause the same to be paid in goods, purchased as provided in the next section of this act.

“Sec. 13. * * * That all merchandise required by any Indian treaty for the Indians, payable after making such treaty, shall be purchased under the direction of the Secretary of War, upon

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proposals to be received, to be based on notices previously to be given." ***

The third section of the act of 3d March, 1847, (Vol. 9, p. 203, ch. 66,) enacts:

"That the eleventh section of the act to provide for the organization of the department of Indian Affairs, approved June thirtieth, eighteen hundred and thirty-four be, and the same is hereby so amended as to provide that all annuities or other moneys, and all goods stipulated by treaty to be paid, or furnished to any Indian tribe, shall, at the *discretion* of the President, or Secretary of War, instead of being paid over to the chiefs, or to such persons as they shall delegate, be divided and paid over to the heads of families and other individuals entitled to participate therein, or with the consent of the tribes be applied to such purposes as will best promote the happiness and prosperity of the members thereof, under such regulations as shall be prescribed by the Secretary of War, not inconsistent with existing stipulations. And no such annuities, or moneys, or goods, shall be distributed or paid while they are under the influence of any description of intoxicating liquor, ***** , and all executory contracts made and entered into by any Indian for the payment of money, or goods, shall be deemed and held to be null and void, and of no binding effect whatsoever."

Now, on the inspection of the amendatory act of 1847, it is seen that its material provisions, so far as pertinent to the subject, are:

1. Authority given to the President, in his discretion, to distribute the annuities to the heads of families or the persons entitled to participate therein.

2. Or, with consent of the tribe, to apply this annuity to such purposes as will best promote the prosperity of the members thereof, under such regulations as shall be prescribed by the Executive, not inconsistent with existing stipulations.

3. Declaration of the nullity of executory contracts for the payment of money or goods, *made and entered into* by any Indians.

The act does not say, "executory contracts entered into by any tribe of Indians as a tribe," but "entered into by any Indians." The two things are perfectly distinct. Congress has

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deprived of legal validity the executory contract of an Indian. It has not in words declared, and in my opinion could not have intended to declare, null, every executory contract entered into by a tribe or nation of Indians.

Nor, in giving the President discretion to distribute the annuities by families, does the act annul the contract of a tribe. In submitting the mode of distribution to the President's discretion, it must, of course, mean a wise and lawful discretion. Indeed, the validity of treaty stipulations is expressly recognised, as limiting the discretion of the President. And Congress has not at any time declared, even supposing it has the power so to do, that an Indian tribe shall not be permitted to assume as a nation, and make its own, the debt of the individual Indian or Indians.

I conclude, therefore, that there is nothing in the act of 1847, or any other act of Congress, which annuls the obligations under consideration as obligations, or absolutely precludes their payment by the President of the United States.

In conformity with which conclusion, seems to have been that of the Government at the time of the passage of the act; for the Commissioner of Indian Affairs, (Mr. Medill,) in the instructions of August 30th, 1847, made in special reference to the said act, expressly recognises these contracts as payable in certain conditions and circumstances, such as will pass under review in the sequel of this opinion. (Regulations of the Indian Bureau, 1850, p. 84.)

But this conclusion does not by any means dispose of the substantial inquiry submitted by your communication and the documents accompanying it, as the arguments of the parties holding these obligations assumes.

True, there is nothing in the acts of Congress which forbids the President to recognise and pay these obligations. But is there, on the other hand, anything in the acts of Congress, by which he is compelled to recognise and pay them? I think not. The power of appointment, or of delegation, conferred on the Indians, so far as regards the payment of their annuities, by the act of 1834, if indeed its recognition be imperative and absolute by that act, which is doubtful, is so far modified by the provisions of the act of 1847, as to be subject to the discretion

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of the President of the United States, in the manner and with the limitations, which that and other acts of the Government define. To appreciate all the relations of the subject, therefore, it becomes necessary to analyze more carefully the writings before me, and to compare all the parts thereof with the acts of Congress, and to view them also in the light of treaty stipulations and of the general policy of the government towards the Indians.

I have, for brevity's sake, spoken of these writings as obligations. They are this and something more.

In the first place, the Potawatomie Indians acknowledge themselves to be indebted as a nation, by several distinct writings, to A., B., C., and so forth, for a consideration or value received, which is set forth in the acknowledgment. That is a debt of the nation to third parties, which, as we have already seen, is not invalidated by any act of Congress, nor is it affirmed by any act of Congress. The President is not positively *required* by statute either to pay it, or to refuse to pay it.

In the second place, the Potawatomes request the President to discharge these debts of theirs out of the annuities, due or coming due to them, from the United States. Is the President, in the exercise of the powers specifically given him by the acts of Congress under consideration, by treaty engagement, or by any general principle, bound to comply with the request thus made by the Potawatomes? That, after all, is the grave question in this whole matter.

Now, it is obvious to observe, as a point of general doctrine even of municipal law, that it does not follow, if A. owes B., and C. owes A., that C. must of necessity accept and pay the draft or order of A. in favor of B.; that is to say, it falls within the ordinary province of special contract, of legislation, and of that judicial construction which constitutes so much of the received rules of law, to limit or define the circumstances under which the debt, which C. owes to A., shall be subject to be paid by his order to a third person.

Now does it follow, because C. has funds in his hands belonging to A., that he shall pay them out under all circumstances to the order of A.? That again depends on special contract, on

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legislation, and on judicial construction, according to the various relations of men and of things.

Suppose that A. is a minor or other person under wardship; and that C., the guardian of A., has the custody of his effects and estate: is C. bound of right to pay any order in favor of a third person, which the ward may see fit to draw upon him? Clearly not. C. has a legal discretion to pay the draft of A. or not, according as the consideration of the draft may in part or whole be legally or equitably due from A. to the payee nominated in the draft. The original contract of the minor may be a void one, for utter want of legal consideration, or it may be voidable according to the nature of the consideration; and these are matters to be examined into by C.

Or C. is the trustee of an estate, the income of which he is to pay to the cestui que trust A., for the sustenance of himself and his family, and the education of his children; in which case the obligation of C. to pay a debt due, or purporting to be due, from A. to B., depends on the nature of the debt and its relation to the trust fund, which things it is the duty of C. to look into.

If, now, we rise above these elements of municipal law into those regions of public law and of political right, in which the subject properly belongs, we come at once to the indubitable fact, that Indians are in one sense the subjects of the Government, and in another its pupils and wards. The true nature of our legal and political relation to them can no longer be drawn in question, since the decision of the case of *The Cherokee Nation v. The State of Georgia* (v Peters, 1-17), which adjudges that the Indians are domestic dependent nations; that they are in a state of pupilage; that their relation to the United States resembles that of a ward to his guardian; that they look to our government for its protection; and address the President as their Great Father.

Accordingly, under the whole series of our treaties with the Potawatomies and other Indians, the United States hold large sums of money in trust for their benefit, and to be faithfully administered and equitably disposed of, and which funds are placed, so far as regards the mode of payment and distribution, in the wise discretion of their Great Father, the President.

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He, in the exercise of the powers conferred on him by the Constitution and by acts of Congress, is the administrator of the trust funds reserved for the use of the Indians.

In the discharge of this duty of the Government, as the general guardian of the Indians, Congress has recently enacted that "no appropriation hereafter made for the benefit of any Indian, or tribe, or part of a tribe of Indians, shall be paid to any attorney or agent of such Indian or tribe, or part of a tribe; but shall, in every case, be paid directly to the Indian or the Indians themselves to whom it shall be due, or to the tribe or part of a tribe *per capita*, unless the imperious interest of the Indian or Indians, or some treaty stipulation, shall require the payment to be made otherwise, under the discretion of the President." (Act of August 30th, 1852, ch. 104, sec. 2, p. 57.)

This late act, although it does not apply to the present case, directly, because posterior in point of time to the contracts under review, and because the present writings are not a mere power, but are an assignment for supposed value, yet indicates the general view, which Congress entertains, of the whole matter. And as, by this act, the President is authorized to go behind a mere power of attorney granted by an Indian or an Indian tribe, and inquire whether it be for the "imperious interest" of the Indian or the Indian tribe to regard it and give it effect, so, by the act of 1847, and by general principle, he may inquire into the consideration of an order on him by an Indian tribe to pay over their annuity to a third person in discharge of an alleged debt, and proceed in the premises as in his sound discretion may best comport with the "imperious interest" of his pupils and wards, the Indians concerned.

The several acts of Congress make a saving of treaty stipulations.

I do not feel called on to say, in this connection, how far, in my opinion, the treaties between the United States and the Indians are obligatory on the Government. It suffices to observe that, on a careful examination of the numerous treaties between the United States and the Potawatomie Indians, no stipulation is found, which requires the President to pay their annuities to an assignee, appointee, or agent, whether with or

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without interest. The engagements are to pay to the nation, or to particular tribes of the nation, or to a chief and his band, or to individual Indians, or to creditors of theirs by name or schedule. There is no clause of any one of them which forbids the President to do, what in my judgment Congress has empowered and expects him to do, that is, to consider, in his discretion, whether payment of a given assignment to third parties is or is not for the advantage of the Indians themselves.

In deciding this question, he will, of course, bear in mind the considerations of good faith, justice, and equity, as between the Indians and their creditors; for discretion is to discover by the law what is right: according to the saying of Sir Edward Coke, "Hereby the crooked cord of that, which is called discretion, appeareth to be unlawful, unless you take it as it ought to be, discernere per legem quid sit justum." (ii Inst. p. 86, com. on 29th ch. of Mag. Charta.)

So, if he ascertain, on examination of these contracts, that they were made in good faith, for lawful consideration of necessities furnished to the Indians, and at a fair price, he may well conclude to pay the appointees according to the tenor of the appointment; or, if the contrary appear, he may well, in his discretion, refuse to accept and pay the drafts thus drawn upon him without previous consent and authority; just as, in either case, a guardian or trustee might do in regard to debts contracted by his ward. And, if he determine to pay the debts, he can, if he see fit, so apportion the time of payment, according to the wants of the Indians, and the relation of the debts to the sums due them as annuity at a given time, as may be requisite in the beneficial administration of the estate of these Indians in the hands of the United States.

It does not constitute a valid objection to this doctrine, nor does it present a legal contradiction, to say, that the effect of all this is to leave the creditor of Indian tribes or nations without complete remedy for the recovery of a debt of the tribe or nation, which debt has, nevertheless, been admitted not to be declared null by any act of Congress. Nor, be it remembered, is there any remedy in law against one of the States of the Union, for a debt contracted by such State. The hypothesis, upon which alone the validity of these obligations of the Potawato-

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mies can be maintained, is that they are a quasi-nation or state, which has voluntarily assumed the debts of its members, which debts had no legal validity whatever, they being executory contracts expressly annulled by the act of Congress. These engagements, therefore, in so far as they have the stamp of nationality, enter in other respects into the analogies of their category, and, like other national engagements, become questions of good faith, not of technical obligation; and in the present case, which is of a mere request to the President to pay, the question of obligation by good faith is to be judged by the President.

I have the honor to be, very respectfully,

C. CUSHING.

Hon. R. McCLELLAND,
Secretary of Interior.

 COMPENSATION OF TERRITORIAL JUDGES.

Territorial Judges, absent from the Territory for a period of three months, can obtain their salaries only on certificate of the President that the absence was for good cause.

ATTORNEY GENERAL'S OFFICE,
June 18, 1853.

SIR: I have examined the case presented by the letter of the Hon. D. Cooper, of the 1st of May last, which you were pleased to refer to me, and find that Mr. Cooper, one of the judges of the Territory of Minnesota, having been absent from that territory for a period of three months, is unable to obtain his salary for that period without a certificate of the President that the absence was for good cause, such being the provision of the act of June 15th, 1852. (Session Laws, p. 10.)

The discretion thus given to the President was, it is true, taken away by the 7th section of the act of August 31st, 1852, (Session Laws, p. 98,) which made the forfeiture of salary absolute on an absence of the party, for sixty days, from the territory of which he might be an officer; but that provision of law has been repealed by the 2d section of March 3d, 1853, (Session Laws, p. 188,) the effect of which is to leave unimpaired

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the authority previously conferred on the President in the premises.

Mr. Cooper states that he was absent on account of ill-health, and without neglect of any official duty; and I therefore advise a certificate to the accounting officers, which may enable him to receive the balance of his salary.

It appears from this and other cases, which have come to my knowledge, that officers of Territories occasionally absent themselves from the place of their duties for a considerable time, under circumstances in which the President may have reason to doubt of the sufficiency of the cause, and to the prejudice of the public service. To avoid which in future, I advise that a circular be addressed from the Treasury Department to all the officers of Territories, notifying them that the President will not, in any case hereafter, certify the sufficiency of the alleged cause of any absence of the officer from his Territory unless such absence shall have been communicated to and sanctioned by the proper head of Department, according to the analogy practised in other branches of the Government.

I have the honor to be, your obedient servant,

C. CUSHING.

The PRESIDENT.

FEEES OF MARSHALS.

Marshals are entitled to compensation for transporting witnesses in custody, though it be not mentioned by the statute, by analogy of the statute compensation for the transportation of criminals.

ATTORNEY GENERAL'S OFFICE,

June 18, 1853.

SIR: In answer to the inquiry of the Marshal of the Southern District of the State of New York, referred to me by your note of the 13th ult., I state as follows:

The act of Congress of February 26th, 1853, to regulate the fees and costs to be allowed clerks, marshals, and attorneys of the courts of the United States, provides a marshal's fees, "for transporting *criminals*, ten cents per mile for himself, each necessary guard, and each prisoner." If the language were

Judicial Expenses in China.

"For transporting *prisoners*," it would have disposed of the case presented as a subject of inquiry, namely, that of a witness in custody for safe-keeping; but it does not, and the case is not provided for by the act. It is a *casus omissus*. I think, for such duty, that is, the transportation of a witness in custody, the Marshal is entitled to charge the fee of the nearest analogous case, that of transportation of a criminal as allowed by the act of Congress, or actual expenses, to be certified by the court.

The act, it is true, declares, at the outset, that, in lieu of the present compensation of attorneys, clerks, marshals, and others, "the following and no other compensation shall be allowed." But this must be understood as "the following and no other compensation, for any service mentioned in the act." If the attorney, clerk, or marshal is compelled by law to perform a service or incur a charge, in a matter not specified by the act, he is to receive a reasonable allowance therefore, notwithstanding the above cited phrase of a general conclusion.

I have the honor to be, your obedient servant,

C. CUSHING.

Hon. R. McCLELLAND,
Secretary of Interior.

JUDICIAL EXPENSES IN CHINA.

In the absence of any specific appropriations for the object, the expense of transporting prisoners held for trial by the authorities of the United States in China are a lawful charge on the general appropriations for defraying the judicial expenses of the Government.

ATTORNEY GENERAL'S OFFICE,

June 28, 1853.

SIR: I have the honor to reply to your communication of the 11th of May, presenting the question, whether expenses, amounting to \$204, incurred by C. W. Bradley, Jr., Vice Consul of the United States in charge at Amoy, on account of certain prisoners (Chinese) brought to that port, and thereupon transferred to Hong-Kong, to be tried there for piracy, are

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lawfully chargeable to the Government of the United States, and if so, to what appropriation.

It appears that the alleged piracy was committed on board the American ship Robert Bowne, the accused being passengers therein, bound to California, and that the expenses were for keeping the alleged pirates at Amoy as prisoners, until they were transferred from Amoy to Hong-Kong for trial, and for obtaining evidence of their crime.

I think, the prosecution having been properly instituted by the American authorities in China, the expenses referred to are properly chargeable to the judiciary fund so commonly called, being the fund appropriated for defraying "the expenses of prosecutions for offences committed against the United States, and for the safe-keeping of prisoners." The expenditures in question seem to me to be strictly within the letter, as well as the spirit, of the terms of this appropriation in the several acts of Congress. It is to be remembered, that by the act of August 11th, 1848, the ministers and consuls of the United States in the Chinese and Ottoman empires are clothed with the power of judicial officers of the Government.

I am, very respectfully, your obedient servant,

C. CUSHING.

Hon. WM. L. MARCY,
Secretary of State.

LEGALITY OF WARRANTS OF ATTORNEY.

Sundry parties, having conflicting claims against the Government under a statute making provision to defray the expenses of removing the Choctaw Indians from the State of Mississippi, an arrangement between them was made to refer the matter to the arbitration of J. M. C. and P. R. F., with power of attorney to receive the money on their behalf and receipt for the same to the United States: Held, that this is not a case of the transfer or assignment of a claim, or of agency thereof, forbidden by acts of Congress.

ATTORNEY GENERAL'S OFFICE,

June 29, 1853.

SIR: I have received your communication of the 8th, and submit herewith my conclusions on the inquiry therein made.

Legality of Warrants of Attorney.

It appears that on the 30th of August, 1852, Congress appropriated the sum of \$37,412, "for supplying a deficiency in the appropriation heretofore made for removing the Choctaw Indians from Mississippi, as estimated by the Commissioner for Indian affairs."

The estimate referred to was "for payment to William B. Hart, assignee of contractors for the removal of the Choctaw Indians, * * a balance heretofore reported to be due by this office."

But, different claimants having appeared for the money, rendering it doubtful to whom it ought to be paid, an arrangement, to obviate the necessity of proceedings in equity, has been entered into between all the parties alleging legal or equitable interest, who have agreed to refer the matter to the decision of Messrs. James M. Carlisle and Philip R. Fendall, and, in execution of the agreement, the principal claimant, William B. Hart, with the assent of the other parties, has given a power of attorney to the said Carlisle and Fendall to receive the money and receipt therefor to the United States.

Upon which facts, the question presented is,—“Whether the power of attorney ought not, in view of the acts of July 29th, 1846, and February 26th, 1853, to be made and executed after the allowance of the claim, the ascertainment of the amount due, and the issuing of the warrant for the payment thereof.”

The act of July 29th, 1846, in relation to the payment of claims, (ix Stat. at Large, 41,) declares that “whenever a claim on the United States aforesaid, shall have been allowed by a resolution or act of Congress,” * * * a warrant of attorney to receive the money must be produced to the proper disbursing officer, “executed by the claimant or claimants, executors, administrator or administrators, after the enactment of the resolution or act allowing the claim; and every such warrant of attorney shall refer to such resolution or act, and expressly recite the amount allowed thereby, and shall be attested by two competent witnesses, and be acknowledged * * * before an officer having authority to take the acknowledgment of deeds, who shall certify such acknowledgment, * * * and that such officer read and fully explain such warrant of attorney to the person or persons acknowledging the same.”

Legality of Warrants of Attorney.

The power of attorney presented in this case is, in substance, a sufficient compliance with the requisitions of the foregoing act; and the difficulty arises upon the construction of the act of February 26th, 1853, to prevent frauds upon the Treasury of the United States, which enacts, in all which is material to the question before us, as follows:

“Sec. 1. That all transfers and assignments hereafter made of any claim upon the United States, or any part, or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities, for receiving payment of any such claim, or any part or share thereof, shall be absolutely null and void, unless the same be freely made and executed in the presence of at least two witnesses, after the allowance of such claim, the ascertainment of the amount due, and the issuing of the warrant for the payment thereof.

“Sec. 7. That the provisions of this act, and of the act of July 29th, 1846, entitled ‘An act in relation to the payment of claims,’ shall apply and extend to all claims against the United States, whether allowed by special acts of Congress, or arising under general laws or treaties, or in any other manner whatever.”

The act of 1846 relates to claims allowed by a resolution or act of Congress, directing the payment of a specific amount; and to warrants of attorney for receiving the same from the proper disbursing officer: and requires that “every such warrant of attorney” shall have the formalities of referring to the act or resolution of allowance, and a recital of the amount allowed thereby, with the authenticity of attestation by two competent witnesses, together with the acknowledgment certified by an officer upon his reading and explanation of “such warrant of attorney” to the maker thereof.

The first section of the act of February 26, 1853, relates to “transfers and assignments,” thereafter made, “of any claim upon the United States, or any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration thereof.”

These “transfers and assignments” of any claim upon the United States, or any part or share thereof, or interest therein,

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and all "powers of attorney, orders, or other authorities for receiving payment of any such" transfers and assignments, in whole or in part, are declared void, unless freely made and executed in presence of two witnesses, "after the allowance of such claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof."

A "warrant of attorney," *ex vi termini*, is a power, given by one man to another, to act in the name and to the use of the person who gives it. The power of one man to act for another depends upon the will and license of that other, and the power ceases when that will or permission is withdrawn. The general rule is that a power of attorney may, at any time before it is actually executed, be revoked by the party who makes it; and by his death it is, *ipso facto*, revoked. It must be executed in the name of the person who makes it. (*Hunt v. Rousmanier*, viii Wheat. 201-203-204-205.)

But a "transfer and assignment" is not revokable by the assignor. It is not revoked by his death; it survives and remains valid against the assignor's heirs, executors, and administrators. The assignee acts in his own name and to his own use.

If, upon a warrant of attorney, the money of the principal is received by the attorney, who neglects to pay it over to his principal, an action of assumpsit against the attorney may be maintained by the principal for money had and received to his use.

But an assignee, who receives money from the treasury of the United States by virtue of a transfer and assignment, receives it to his own use, and no action against him to recover it can be maintained by the transferor and assignor, unless he can impeach and invalidate the transfer and assignment.

These important differences, in the character and effects of warrants of attorney and assignments, have not been overlooked by Congress in enacting the acts of 1846 and 1853, but have been left untouched and unconfounded.

There is nothing in these statutes, taken severally together as one whole, which can justify an expositor of them in disregarding the manifest distinctions in law, between warrants of attorney on the one hand, and transfers and assign-

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ments on the other, which are the different objects of the two acts, the one being the subject of legislation in the act of 1846, and the other the subject of legislation in the first section of the act of 1853.

- The seventh section of the act of 1853 expressly looks to the act of 1846 as existing and unrepealed, extends its provisions, beyond claims "allowed by a resolution or act of Congress," to all warrants of attorney for receiving "all claims against the United States, whether allowed by special acts of Congress, or arising under general laws, or treaties, or in any manner whatever."

This seventh section requires that "all transfers and assignments" in whole or in part, and all powers, orders, or other authorities for receiving payment of any such transfer and assignment, in whole or in part, shall be verified and authenticated according to the act of 1846, which, in that respect, is more full and complete than the authentication mentioned in the first section of the act of 1853.

But this seventh section does not change, extend, or transform the first section of the act of 1853, from an enactment on the subject of transfers and assignments and powers, orders and authorities to receive the money upon such transfers and assignments, into an enactment upon the subject of warrants of attorney to receive money to the use of the principal claimant.

Without entering into the consideration of the inconveniences and perplexities of the opposite construction of these acts, it suffices for the purpose of the present inquiry to say, that, in my judgment of the legal import of the several enactments, Congress has not undertaken to abolish, and has not abolished, the distinction between "a warrant of attorney" (or powers of attorney) and "transfers and assignments," nor between powers of attorney given by an original claimant to receive money to his use, and powers of attorney, made in behalf of or by assignees, to receive moneys from the public treasury to the use of the assignees. Congress has not placed those different instruments; so distinctively variant in character and effect, in the same category; but has preserved the distinction between them, so that warrants of attorney, containing the proper

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recitals and references, and duly authenticated according to the act of 1846, are not necessarily to be made and executed after the issuing of a warrant for the payment thereof; and that the first section of the act of 1853 applies only to "transfers and assignments" of claims, in whole or in part, and to powers, orders, or authorities to receive the moneys upon such transfers and assignments.

I am of opinion, therefore, that the warrant of attorney under review is a sufficient authority to the proper officers of the treasury to allow and pay the sum of money, which it covers, to the attorneys, Messrs. Carlisle and Fendall.

I have the honor to be, very respectfully, your ob't servant,
C. CUSHING.

Hon. ROBERT McCLELLAND,
Secretary of the Interior.

BRITISH AND AMERICAN INTERNATIONAL COMMISSIONERS.

The salary of the American Commissioner commenced on his taking the oath of office; and he is entitled to the cost of transportation to and from London.

ATTORNEY GENERAL'S OFFICE,
June 29, 1853.

SIR: I have considered the inquiry submitted by you, as to the construction of certain clauses of the convention between the United States and Great Britain, concluded at London on the 8th of February, 1853, for the adjustment of certain claims of citizens of the United States on the British Government, and of British subjects on the Government of the United States.

That convention provides for the adjudication of the claims in question by means of two commissioners, one appointed by each Government, and of an arbitrator or empire, to be named by the commissioners.

The commissioners are expressly authorized by the convention to employ a "clerk or other persons to assist them in the transaction of the business which may come before them;" and it speaks of "contingent expenses," in addition to the "salary" of each commissioner and of the arbitrator: so that no doubt

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can be entertained of the intention of the convention to provide for all the necessary and proper means of transacting the prescribed business, such as rent of the house or office in which it shall be transacted, stationery, fuel, messengers, servants, and other objects of expenditure of this class. But doubt remains on several points touching the compensation or expenses of the commissioners.

The clauses of the convention on which the doubt arises, are the following:

“Each Government shall pay to its commissioner an amount of salary not exceeding three thousand dollars, or six hundred and twenty pounds sterling, a year, which amount shall be the same for both Governments.

“The amount of salary to be paid to the arbitrator ** shall be determined by mutual consent at the close of the commission.

“The salary of the clerk shall not exceed the sum of fifteen hundred dollars, or three hundred and ten pounds sterling a year.

“The whole expense of the commission, including contingent expenses, shall be defrayed by a suitable deduction on the amount of the sums awarded by the commission: provided always that such deduction shall not exceed the rate of five per cent. on the sums so awarded.

“The deficiency, if any, shall be defrayed in moieties by the two Governments.”

Now, in regard to whatever there may be uncertain in these clauses, it is material to observe that as any balance of expenses, in case they exceed five per cent. of the sums awarded, is to devolve on the two Governments by moieties, they have a joint interest in the question of the sum total of the expenses, as indeed they have, even if the expenses do not exceed the five per cent., because the sums awarded are to be paid by the respective Governments. It is obvious, therefore, that neither Government can separately, of itself alone, determine absolutely any doubt arising on this part of the convention. Such doubt, like the amount of salary of the arbitrator, will have to be determined, at the close of the business, by mutual consent of the two Governments. Of course, no opinion of any offi-

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cer of either government will be conclusive as to the true construction of the convention. All that any such officer can do is to say what is, according to his judgment, equitable and right in the premises, for the guidance of his government *de bene esse*, on the assumption, of course, that all matters of unsettled detail will be jointly determined, in due time, amicably, and in perfect good faith, by mutual consent of both governments.

These considerations being premised, the following questions present themselves, viz.:

1. At what time ought the salary of the American commissioner to commence?

I think the case is to be governed by the analogy of other cases of the same nature, and that, as the functions of the commission are quasi-judicial, he is entitled to his salary from the time of taking the oath of office required by the act of Congress of June 1st, 1789. (i Stat. at Large, 22).

2. As the commission is required by the convention to sit in London, ought not the American commissioner to be allowed by the two governments, to charge his travelling expenses to and from London?

I think he ought: otherwise the equality of compensation for the two commissioners, which the convention evidently contemplates, would not exist. Indeed, as the commission sits in the country, and probably in the very place of residence, of the British commissioner, while the American commissioner is in a foreign country, inequality between them in respect to compensation cannot be wholly removed, but it may be diminished by allowing the American commissioner his necessary expenses to and from London, and charging this in the final adjustment between the two governments.

I have the honor to be, your obedient servant,

C. CUSHING.

Hon. WILLIAM L. MARCY,
Secretary of State.

Retroactive Rank of Engineers of the Navy.

RETROACTIVE RANK OF ENGINEERS OF THE NAVY.

By successive acts of Congress, engineers and certain other officers of the Navy, are to be examined for promotion, and if one of them be absent on duty at the time of the examination of his class, he shall, when examined and passed, take rank with the rest, as if examined at the same time: Held, that retroactive pay does not as of course follow the ascription of retroactive rank.

ATTORNEY GENERAL'S OFFICE,

July 1, 1853.

SIR: The communication of the acting Secretary of the Navy, (the Hon. Jefferson Davis,) addressed to me on the 15th ult., presents the question of the legality of the following acts, namely:

1. The rule of the Department, laid down by yourself in a letter to the Second Comptroller on the 27th of May, 1853, to the effect that "when Assistant Engineers are examined, approved, and passed by a board of engineers, such Assistants shall be paid from the dates at which their warrants issue from the Department, without regard to the date with which they may take rank."

2. The rule of the Department prescribed by the acting Secretary of the Navy, in a letter to the Second Comptroller of the 19th of June, 1853, to the effect that "when any officer of the Navy shall be examined and shall be found qualified for promotion by a board of examiners, such officer will be paid from the date at which his warrant or commission shall issue from the Department, without regard to the date with which he may take rank, unless otherwise specially provided for."

The Second Comptroller, in a letter to the Navy Department, alleges a practice to the contrary; and the general inquiry suggested by the two orders is this: By successive acts of Congress, certain officers of the Navy, namely, Midshipmen, Assistant Surgeons, and Assistant Engineers, are to be examined for promotion; and in case any such officer shall have been absent from the United States on duty at the time others of his date were examined, he, if not rejected at a subsequent examination, shall be entitled to the same rank with them; that is to say, rank is assigned to him retroactively, according to what would have been his rank, if he had been present in the United States

Retroactive Rank of Engineers of the Navy.

and had been examined and passed with others of his class; and the question is, whether such officer is then to have increase of pay retrospectively, in accordance with the retroactive ascription of rank. It appears, by the papers in the case, that the Department has heretofore allowed the augmented pay according to the constructive rank; which augmented pay is now disallowed by the new rules of the Department.

I state the question in these general terms; but the solution of it requires a careful analysis of the several acts of Congress.

As a general principle, it has been repeatedly decided by my predecessors, that constructive rank retroactively assigned to an officer does not draw after it retrospective pay. (Mr. Wirt's opinion, May 17th, 1826; Mr. Legare's opinion, November 29th, 1842; Mr. Clifford's opinion, July 14th, 1847.)

There is a *nisi prius* case, *The United States v. Vinton*, ii Sumner, 307, which might seem, at first blush, in conflict with the opinions above cited; but that case, whether well decided or not, was a question of brevet rank, dependent on laws, and referable to principles, quite different from those now under consideration.

It seems to be the purpose of the acts of Congress regarding the Navy, to prevent these claims of constructive allowance.

By the act to regulate the pay of the Navy, passed 3d March, 1835, it was enacted that "officers, temporarily performing the duties belonging to those of a higher grade, shall receive the compensation allowed to such higher grade, while actually so employed." (iv Stat. at Large, 756.)

And by the act, on the same subject, of August 26th, 1842, (v Stat. at Large, 536,) it is enacted that "whenever an officer shall perform the duty of a higher grade, by order of the Secretary of the Navy, or commander of a fleet, or squadron, or ship, acting singly on foreign service, such officer shall be entitled to receive the pay of such higher grade during the time he performs the duty in that grade and no longer, and no allowance shall be made for performing such service hereafter, unless so ordered."

Whilst these provisions of law were in force, a midshipman, lieutenant, assistant surgeon, or other officer, warranted or

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commissioned, might have received the pay of a higher grade, if he had actually performed the duties of such higher grade.

But those parts of the acts of March 3d, 1835, and August 26th, 1842, which allowed officers temporarily performing the duties of a higher grade, to receive the compensation allowed to such higher grade, were expressly repealed by the 3d section of the act of June 17th, 1844, making appropriations for the naval service. (v Stat. at Large, 703.)

This repeal left in full force the prohibitions of the 2d section of the act of March 3d, 1835, (vol. 4, p. 757,) and of the second section of the act of 23d August, 1842, (v Stat. at Large, p. 510,) against extra pay or emoluments in the Navy, or in any branch of the public service, "unless the same be authorized by law, and the appropriation therefor explicitly set forth that it is for such additional pay, extra allowance, or compensation."

These prohibitory statutes were made to put down abuses, and in aid of the rule of common sense, that the compensation to be allowed to officers of the Government of the United States is a subject properly of legislative discretion, and not of executive will.

"Pay is the reward of service in the grade, it therefore follows the date of the service, not the date of the retrospective rank," as was well said by Attorney General Wirt in his opinion before cited.

Attorney General Legare said, in his opinion before cited, "*A priori*, I should deny the right of the Executive to give compensation for services previously performed, without some law expressly or implicitly authorizing such compensation."

When the right to the rank exists, and the duty and command also exist, and services are actually performed under such existing right to rank, and existing duty and command, then the pay and emoluments according to rank, duty, command, and actual service, follow, of course.

But when an assistant surgeon performs services as such for two years, having no rank but as assistant surgeon, or when an assistant engineer performs services as such for two years, having no rank but as assistant engineer, and thereafter the assistant surgeon, and the assistant engineer, being respectively found worthy of promotion by the proper and respective boards

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of examiners, are so reported to the appointing power, the examination and report do not confer upon the assistant surgeon the rank or grade of a surgeon, nor upon the assistant engineer a higher grade; neither do such examination and report, by retroaction, change the nature and quality of the two years' services previously performed, nor the sum of pay and emoluments for those previous services. The warrant, or the commission, granted by the proper authority, and the after services, under that warrant or commission, performed in pursuance of orders, must regulate the pay and emoluments, which the officer is to receive, according to the rates for the different services which the laws have established.

Suppose that, whilst an assistant surgeon is in service at sea, out of the United States, four other assistant surgeons of "his date" (or class) were examined, passed, and reported qualified for promotion to surgeon. In such case, the statute prescribes that this assistant surgeon, so out of the United States, when subsequently examined, if not rejected, shall be entitled to the same rank with them; and if, from any cause, his relative rank cannot be assigned to him, he will retain his original position on the register.

As the number of surgeons is limited to the number of vessels, navy yards, and hospitals, &c., and as the number of assistant surgeons is much larger than the number of surgeons, it necessarily follows, that all assistant surgeons of the same date (or class), who are examined and passed as qualified to be promoted to surgeons, are not thereby forthwith promoted to surgeons; nor can all of the same class of passed assistant surgeons be promoted to surgeons at one and the same time; but they must await vacancies by death, resignation, putting more ships in commission, or other contingency.

When a vacancy in the rank of surgeons occurs, then one out of the oldest class of passed assistant surgeons will be promoted to surgeon, and the other passed assistant surgeons of the same date (or class) must await other vacancies.

Therefore, an examination, and passing as qualified for promotion, are not promotion, but only a finding of qualification for promotion to surgeon when there shall be a vacancy of surgeon.

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Passed assistant surgeons are not, simply by having been examined and passed, surgeons; they are only in the line of promotion, "found qualified for promotion to surgeon," when a vacancy shall happen: as will be palpable on inspecting the act of 3d March, 1835, before cited, for regulating the pay of the Navy. (v Stat. at Large, p. 755.)

"*Assistant Surgeons.*—Waiting orders, \$650; at sea, \$950; after passing and found qualified for promotion to surgeon, \$850; at sea, \$1200. When stationed at navy yards, hospitals, rendezvous, and receiving ships, \$950. After being passed and stationed as above, \$1150."

This act gives an increase of pay for services, rated according to their kind, and performed "*after* passing and found qualified for promotion to surgeon;" but no increase of pay is thereby allowed for services performed *before* passing as qualified for promotion. A passed assistant surgeon, when waiting orders, or when stationed at a navy yard, hospital, rendezvous, or receiving ship, receives less pay than an assistant surgeon not passed who is at sea. To an assistant surgeon, who was out of the United States on duty, when his fellows of "his date" were examined and found worthy of promotion, this law preserves his relative rank with them, his relative claim to promotion, if, when subsequently examined, he shall be passed and found worthy of promotion. But it does not give to him any additional pay until after he himself has been examined and found qualified for promotion. When passed and found qualified, he acquires thereby no retrospective claim to additional compensation for previous services.

Suppose, whilst at sea on duty, out of the United States, as assistant surgeon, four of "his date" (or class) are examined and passed as qualified for promotion; six months thereafter the absent assistant surgeon comes home in his ship, is on shore, and examined, and found worthy of promotion; two of "his date," who were examined and passed, in his absence, are stationed at hospitals at \$950 per year, each, and the other two are waiting orders at \$850 each. Now, as to relative rank, he who was last examined and passed, stands with the four of "his date" just the same as if he had been examined and passed with them. But what as to the pay? For the six

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months whilst he was at sea, at the rate of \$950 per year, his pay was better than that of his two classmates, who were, during that time, waiting orders,—and it was equal to that of each of the other two who were stationed at hospitals. But what as to the pay after his own examination and passing as qualified for promotion? He cannot choose as to pay to be on a par with his classmates, who, by order, are stationed at hospitals. But he must be upon a par with his two classmates, who are expecting orders. He, perhaps, may be ordered to sea, leaving all his classmates on shore; and so the first may be last, and the last may be first, to get the pay at the rate of \$1200 per year; and one of his classmates may be the first to be promoted to the rank of surgeon.

What has been said as to assistant surgeons, is applicable also to assistant engineers and to midshipmen.

From the passage of that clause, in the act of 3d March, 1835, which directed that "officers of the Navy, temporarily performing the duties belonging to those of a higher grade, shall receive the compensation allowed to such higher grade," until the repeal of it by the act of 17th June, 1844, naval officers might have been lawfully paid, for temporary services, compensations greater than the pay and emoluments belonging to their warrants or commissions. But if, at other times, and on other occasions than those embraced in the clause above quoted, a practice has prevailed of allowing to assistant surgeons, midshipmen, and assistant engineers, pay above that belonging to their respective warrants or commissions;—and especially if the practice has prevailed of allowing to any of such officers, not only the rank, but the pay of the rank from the time others of his date were examined;—and this, in some cases, as it is stated in the papers before me, for nearly two years between the general examination of a class and the examination of an individual member of it;—such practice was not, in my opinion, warranted by law; on the contrary, "it was," in the emphatic language of Mr. Legare, "an abusive practice, and ought to be abolished." (Opinion November 29th, 1842.)

The practice of the Department, as stated by the Second Comptroller, cannot alter, nor repeal, nor enlarge a statute, nor make a law.

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In the celebrated case of general warrants, the Court of King's Bench say :

"A usage to grow into a law, ought to be a general usage—*communiter usitata et approbata*—and which, after a long continuance, it would be mischievous to overturn."

"This is only the practice of a particular office.

"No degree of antiquity can give sanction to a usage bad in itself." (Money et al. v. Leach, iii Burr. 1742-1767.)

Upon these principles, the Court unanimously adjudged the warrant in the case, which had been issued by the Earl of Halifax, one of the King's principal Secretaries of State, to be bad, although the form of the warrant was according to the usage of the office of the Secretary of State since the Revolution; that is, from 1688 down to 1763, the date of the warrant.

Here, on the other hand, the practice, stated by the Comptroller, is, comparatively, of recent origin.

The acts of Congress expressly provide, in the cases under consideration, that rank shall be dated back; but they do not provide that pay shall be dated back; on the contrary, the plain sense of the statute, and the analogies of legal construction, lead alike to the opposite conclusion, namely, of pay for services in a given rank, not pay for merely constructive assignment of a superior rank by retroaction.

The claim of pay for constructive rank, superior to the rank of actual right and service, is founded on the idea that an assistant surgeon, assistant engineer, or midshipman, looking to the possibility of his class being examined during his absence, and thus being put on the pay of the superior rank before him, will be prone to escape sea service, and that the effect will be, a premium for inactivity, or, as it should be rather be stated, for criminal evasion of duty. If this be so, the remedy lies with Congress.

In fine, the instructions of the Department of the 27th of May and 9th of June, are, in my opinion, in strict conformity with the only true construction of the acts of Congress.

I have the honor to be, very respectfully, your obedient servant,

C. CUSHING.

Hon. JAMES C. DOBBIN,
Secretary of the Navy.

Case of Lund v. Ogden.

CASE OF LUND v. OGDEN.

During the war between the United States and the Mexican Republic, while General Taylor occupied the line of the Rio Grande, one Lund undertook to set up ferry across the river, in which he was interrupted by Major Ogden, of the United States, in obedience to the command of General Taylor.

Held, that no action lay against Major Ogden for this act. Held, also, that on a suit brought by Lund against him in the State of Texas, he not residing there, and having never held a domicile there, and no personal service in Texas having been made on him, and he not having property in the State, also no valid judgment can be rendered, at least, none which can be made effective out of the State of Texas.

Where an officer of the Army or Navy is sued on account of acts alleged to have been performed in the line of his duty, the Executive is to judge in his discretion, whether the case is one of which the defence is to be assumed by the Government.

ATTORNEY GENERAL'S OFFICE,

July 27, 1853.

SIR: I have examined the report in the matter of Major Ogden, the copy of proceedings in the action of Lund v. Ogden, and the questions thereon presented by your letter of the 11th instant.

It appears that, upon a suit, brought by one John F. Lund against Major Ogden, in one of the courts of the State of Texas, judgment was rendered during the present year for the sum of \$13,250 damages, for alleged disturbance, in 1847, of a right of ferry then claimed by the plaintiff across the Rio Grande, the pretended disturbance consisting of acts charged as having been performed by the defendant in the line of his duty as an officer of the Army, under direction of his superior officers, during the late war between the United States and the Mexican Republic.

The record shows that, at the time the suit was brought, the defendant was at Fort Leavenworth on the river Missouri; that he is not and never has been domiciled in the State of Texas; that personal service was never made on him in the suit, nor any property of his attached, the only service pretended being by citation published in a local newspaper; that no appearance was entered for him, nor plea filed; and that a verdict was taken and judgment rendered by default.

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According to all the received doctrines of justice and law, no court, under the facts presented by this record, could have jurisdiction of the case; and having no jurisdiction, any judgment it might render must be a mere nullity, giving no rights, barring no rights, concluding nobody and nothing; not voidable, but simply void, so that any persons attempting to execute it would be trespassers. To this effect are all the authorities. (See, *e. g.*, *Wise v. Withers*, iii Cranch, 330-336; *Rose v. Himely*, iv Cranch, 268; *Elliott v. Piersol*, i Peters, 340; *Lessee of Hickey v. Stewart*, iii Howard, 762.)

I am not aware of any law of the State of Texas, so foreign to all the principles of jurisprudence and of universal justice, as to authorize her courts to assume jurisdiction in a suit, where neither the person nor the property of the defendant was within the limits of the State, or he domiciled there; and we are bound, in deference to the court by which the judgment was rendered there, to assume that the question of jurisdiction passed unnoticed, by reason of there being no appearance and no defence to the action.

Be that as it may, however, it seems clear, that, if valid in Texas, such a judgment would have no effect as such in any other State or in any Territory of the United States. (*Bissell v. Bright*, ix Mass. Rep. 464-468; *Hall v. Williams*, vi Pickering, 239-240-242-244; *Woodward v. Tremere*, vi Pickering, 354, and cases cited in *Hall v. Williams*, *ubi supra*.)

As to the public notices issued in this case, it is perfectly well settled that a citation *viis et modis* cannot give any legitimate jurisdiction as against a non-resident; that, if authorized by the law of the country, its effect is purely local; and that elsewhere it is to be held as a mere nullity. (*Buchanan v. Rucker*, ix East, 192-194, and cases cited in *Story on Conflict of Laws*, s. 546-548.)

So, of a nominal attachment of goods of the defendant, which is to be treated only as a proceeding *in rem*, and is not personally binding as a judgment *in personam*, and therefore has no extra-territorial force or obligation. (*Story on Conflict of Laws*, sec. 549.)

All proceedings of this kind, by which one State undertakes to exercise constructive jurisdiction over the absent citizens of

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another State, are acts in violation of international comity, and a usurpation of general sovereignty, in derogation of the rights of co-equal States and of their residents or subjects. (*Picquet v. Swan*, v *Mason*, 35, 40, 42.)

I cannot but think that, on proper proceedings to that effect being had in Texas, as by petition for review or otherwise, the present judgment would be reversed. Indeed, among the documents themselves are papers, probably not submitted by the plaintiff to the court and jury, which constitute a complete answer to the suit so far as Major Ogden is concerned, by showing that the alleged disturbance of ferriage, if any, was by Lieutenant Thomas J. B. Weld, and not by Major Ogden, to say nothing of legal considerations of defence, such as that the pretended ferry was beyond the limits of the State under whose authority it was set up, and passed into the enemy's country at that time in the actual occupation of the armies of the United States.

Major Ogden ought, undoubtedly, to take steps to have the question properly adjudicated, for it is not to be expected in prudence that Congress, who alone have power to indemnify Major Ogden by paying the judgment, would do so without any defence having been made.

The United States being no party to the judgment, it must, of necessity, be defended by or in the name of Major Ogden.

As to the obligations of the Government in the premises, the general doctrine is, that a public officer, sued for a tort or malfeasance in the discharge of his duty, must defend himself; and if he has acted legally, that gives him a perfect defence to the action. It cannot be admitted, as a general proposition, that whenever an officer or the Army or Navy, for instance, is sued for an alleged illegal act, done under color of his office, that therefore the Executive shall interpose in his behalf. Nor is there any established usage on this subject. In some cases it has been done, in others not. Cases may arise in which it is obviously necessary for the public interest that the Government should undertake the defence of a public officer. In short, it is a matter in the discretion of the Department where the question arises, whether the public interests involved are of such a character as to induce direction that the officer be defended by the United States; and of this the Head of

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Department is to judge, as of any other question of discretion within the functions assigned to him by Congress or by the President.

If, after defence, an officer is subjected in any case to a judgment for damages for an act performed in the line of his duty, it then devolves on Congress to determine whether to indemnify the party. In so doing, it adopts the conduct of the officer, declares it to have been justifiable under the circumstances, and in the interest of the Government.

If, as perhaps may be assumed from the tenor of your letter, you have already decided that the present is a case which calls for the interposition of the Government, permit me to suggest that, under existing laws, it is not a part of the official duty of a District Attorney to act in such a matter, and that counsel will have to be specially retained, under authority to that effect vested by statute in every head of Department. (Session Acts of 1853, p. 162.) It would be convenient, therefore, through the agency of some suitable officer of the Army in Texas, having the means of inquiry and knowledge on the spot, to retain counsel at once, with such limitation of fees as you may see fit to prescribe. And although, perhaps, Major Ogden may not wish to be subject to possible annoyance by being placed within the reach of the party plaintiff in Texas, yet he ought, it seems to me, to be so stationed as to have it in his power to give his personal attention to the case, at least in the instruction of counsel as to facts, and this in his own interest as well as that of the Government, in order that, if there should be a final judgment of damages in the case in due form of law, Congress may be satisfied of the propriety of granting him indemnification.

I have the honor to be, very respectfully,

C. CUSHING.

Hon. JEFFERSON DAVIS,
Secretary of War.

Power of Attorney.

POWER OF ATTORNEY.

An ordinary letter from R. M. H. to J. H. E., authorizing the latter to transact certain business for the former, does not empower him to execute, in the name of the former, a power of attorney, assignment, or other instrument under seal.

ATTORNEY GENERAL'S OFFICE,

August 11, 1853.

SIR: I have examined the letters of Mr. R. M. Hill to the Hon. John H. Eaton, in order to see what power they confer.

Mr. Hill's letters of November 18th, 1852, and February 8th, 1853, authorize Mr. Eaton to manage the case as he may think proper, and in his discretion; that of February 8th, 1853, authorizes him to employ counsel; and that of June 2d, 1852, authorizes him to make any judicious compromise. Under such authority, undoubtedly, Mr. E. might accept reasonable and lawful payment in the premises, and give a discharge for Mr. Hill. But none of these letters empower him to execute a deed of attorney, assignment, or other instrument, *under seal*; for in such case the authority itself must be under seal. (See *Warring v. Williams*, viii Pickering's Reports, 326.) And it may well be doubted whether the general agency, conferred by the letters, would go so far as to support the substitution of an attorney in fact in the place of Mr. Eaton, or the execution of an assignment of the chose in action. (See *Shankland v. Washington, v Peters*, 389.)

I am, very respectfully, your obedient servant,

(Signed,)

C. CUSHING.

Hon. ROBERT McCLELLAND,

Secretary of the Interior.

Case of L. B. Hardin.

TERRITORIAL ATTORNEY.

A Territorial Court cannot appoint an attorney for the Territory, but may designate a person to perform in Court any duty of such attorney in his absence, which person will have a right to compensation from the United States.

ATTORNEY GENERAL'S OFFICE,

August 13, 1853.

SIR: In answer to your inquiry of the 12th inst., I have to state that, in my opinion, a territorial court has no power to appoint an attorney for the Territory, who shall hold office as such and be entitled as of right to the fees and emoluments of the office; but, in case of necessity, in the absence of any attorney for the Territory, duly appointed, and the interests of the Government requiring it, the court may well appoint an attorney *pro hac vice*, who has an equitable claim to compensation, and which compensation the Secretary of the Interior, or other appropriate head of Department, has authority by law to prescribe and allow.

With such allowance authorized, the case can, it is presumed, be disposed of by the Comptroller according to the received course of proceeding, distinguishing between expenses chargeable to the Territory, and those chargeable to the United States.

I have the honor to be, very respectfully, your obedient servant,

C. CUSHING.

Hon. R. McCLELLAND,
Secretary of the Interior.

CASE OF L. B. HARDIN.

Construction of the provisions of the act of August 31, 1852, allowing extra compensation to clerks and others in the executive and legislative departments of the Government.

Semble, that a person may hold two distinct offices under the Government and receive the salaries of both.

ATTORNEY GENERAL'S OFFICE.

August 18, 1853.

SIR: It appears by your letter of 17th June and the papers

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accompanying the same, that Mr. L. B. Hardin holds two offices in the Navy Department, one as clerk, and the other as superintendent of the south-western executive building; and the inquiry thereupon is of the bearing on his case of the provision of the act of August 21st, 1852, increasing certain salaries by a per centage.

The statute of 31st August, 1852, (Sess. Acts by Litt. & B. p. 97, ch. 108, sec. 2,) enacts "That the clerks, messengers, watchmen, and laborers employed at an annual salary, or in temporary positions in the Executive and Legislative Departments of the Government in the City of Washington, whose annual compensation does not exceed \$1200, shall, in addition thereto, be allowed an increased compensation of twenty per cent.; all whose compensation shall exceed \$1200 and shall be less than \$1600 shall receive an additional compensation of ten per cent. upon the amount of their salaries: Provided, That no salary shall be increased to more than \$1600 by the per cent. or additional compensation herein provided for: * * Provided that this section shall not extend to more than one salary of any person receiving a salary for discharging the duties of more than one office at the same time, or to any person who does not actually discharge the duties of the office for which he receives such salary: * * Provided that the increase of salary given by this section shall not extend beyond the present fiscal year, without further legislation."

Now, as neither of the salaries of Mr. Hardin exceeds sixteen hundred dollars in amount, but their sum united does, the precise question is, upon the construction of the act cited, whether Mr. Hardin is entitled to claim the additional per centage or not upon either one of his salaries, or whether he is wholly excluded from receiving any addition.

I think a careful analysis of the language of the act, and a consideration of some previous decisions pertinent to the question, afford the means of a safe opinion in the premises.

It is observable, on the very surface of the inquiry, that the act of 1852 explicitly assumes that persons exist, within the purview of the act, who hold two separate offices, discharge their distinct duties, and lawfully receive their different salaries. The words are, "This section shall not extend to more than one

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salary of any person receiving a salary for discharging the duties of more than one office at the same time."

I do not see how it is possible to resist the conclusion deductible from the rational import of these words of the act, namely, that where a person lawfully holds two offices, they shall be considered separately in the calculation of the maximum of sixteen hundred dollars, beyond which no per centage addition is to be allowed.

Undoubtedly the words of the statute are to be understood according to the legal import of the words as they stand, they being regarded of course in the light of the ascertained object of the law, and the mischief it was designed to remedy, as well as of other acts in *pari materia*, and the opinions of appointed administrators of the law or others learned in jurisprudence. But, if there be room for reasonable doubt as to the legal import of the words, we may recur to the history of a statute, among other things, to resolve the doubt; and the expositor of a law, in conscientiously seeking to learn its true meaning, can seek aids to his judgment in the circumstances of its enactment.

Now it is historically known that, when the act of 1852 came before the Senate, it read that the per centage of addition should not be allowed to "any person receiving a salary for discharging the duties of more than one office at the same time;" in place of which the Senate substituted by amendment the phrase that the per centage "shall not extend to more than one salary of any person receiving a salary for discharging the duties of more than one office at the same time;" and the mover of the amendment (Mr. Hunter) expressly declared that the object was to protect those persons, who have salaries as clerks and additional salaries as superintendents of public buildings, and to enable them to have the increase on one salary but not on both. (Daily Globe, Aug. 26th, 1852, p. 2, vol. 5.)

If this fact contradicted the language of the statute, that is, if Congress had not employed apt words legally to express the sense they intended, it would of course be necessary to follow the true legal import of the enactment to its consequences. But the debates prove that the construction of the act, which in its language seems to me to be the natural one, is the very thing really intended by Congress.

But the construction, thus suggested, of the act of 1852, ought not, perhaps, to be conclusively admitted without taking into consideration the effect of certain prohibitory statutes in regard to extra compensation or commutation of salaries.

The statutes of March 3d, 1839, (v Stat. at Large, p. 439, ch. 82, s. 3,) and of August 26th, 1842, (v Stat. at Large, p. 510, ch. 83, s. 2,) forbid clerks and others in the service of the United States, with salary, pay, or emoluments fixed by law or regulations, to receive or be allowed any additional pay, extra allowance, or compensation in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same shall be authorized by law.

These enactments, it is plain, decide nothing in the present case; because their prohibition of extra allowance or additional pay is with the condition "unless the same shall be authorized by law."

The statute of September 30th, 1850, enacts that "the proper accounting officers of the Treasury, or other pay officers of the United States, shall in no case allow and pay to one individual the salaries of two different offices on account of having *performed* duties thereof at the same time. But this prohibition shall not extend to the superintendents of the executive buildings."

This last cited enactment appears in the statute as the proviso to an appropriation allowing to Mr. Richard Rush a sum for occasional services performed by him as Attorney General *ad interim* between the years 1825 and 1829, Mr. Rush being at the time in commission as Secretary of the Treasury and Mr. Wirt as Attorney General. A questionable practice of recent introduction existed, to allow, to a head of Department or any officer thereof, who performed temporarily the duties of another office by designation of the President under the acts of May 8th, 1792, (i Stat. at Large, 281, ch. 37, s. 8,) and of February 13th, 1795 (i Stat. at Large, 415, ch. 21,) the salary of such other office for the time being; and this act, while making appropriations for the settlement of Mr. Rush's claim according to the existing practice, established a different rule for any future cases of the same class.

The construction of these three acts was considered by Chief

Case of L. B. Hardin.

Justice Taney in the case of the *United States v. White*, (Maryland Dis. April T. 1851, MS.) where the defendant, White, being a regularly appointed Navy Agent with salary fixed by law, was also appointed Purser to the naval establishment at Annapolis, for which office there is a salary fixed by law. Performing the duties of both offices, he claimed the salary of both, which was allowed by the court. In doing so, of course, the Chief Justice was constrained to consider and decide the question,—whether a person may lawfully hold two commissions and receive the salaries thereof, under the Government of the United States.

I do not quote this opinion as conclusive of the particular point decided, for I incline to think that, if carried up, the case might have been otherwise determined on the single question of the lawfulness of the particular appointment of purser, instead of the more general one of the lawfulness of plural appointments. I refer to the case only for the purpose of citing the emphatic declaration of the Chief Justice, that “there is no law which prohibits a person from holding two offices at the same time;” this opinion being expressed by the Chief Justice with the acts of 1839, 1842, and 1850 before him as the very subject of consideration.

A similar declaration is made, in view of the same acts, in the opinion of Mr. Crittenden in Rodman’s case. (June 7th, 1851, MS.)

As construed by the Chief Justice and by Mr. Attorney General Crittenden, the meaning of the act of 1850 is correspondent to the abuse which it was framed to abolish. Its effect is that an individual holding one office shall not receive the salary of another which he does not hold, but of which, by temporary appointment or otherwise, he merely performs the duties. It does not prohibit the holding of more than one office with the salary of each: the wisdom or propriety of which is a thing for Congress to determine.

Were the construction of the act of September 30th, 1850, not so, yet, as the superintendents of executive buildings are, by the very terms of the act, expressly excluded from its prohibition, it seems the more certain that it must lawfully be treated as an office different and distinct from that of clerk.

International Extradition.

On the whole matter, therefore, I am of opinion that Mr. Hardin is entitled to elect to take the proportional increase either upon his salary as clerk or upon his salary as superintendent; but that he is not entitled on both; nor, on the other hand, can the two salaries be consolidated and treated as one, to the effect of depriving him of any proportional augmentation.

I am, very respectfully,

C. CUSHING.

Hon. J. C. DOBBIN,
Secretary of the Navy.

INTERNATIONAL EXTRADITION.

The international extradition of fugitives from justice is a duty of comity not of strict right.

It is the settled policy of the United States not to make such extradition except in virtue of express stipulations to that effect.

Hence, the United States ought not to ask for extradition in any case as an act of mere comity.

Larceny is not included in the causes of extradition stipulated as between Great Britain and the United States.

ATTORNEY GENERAL'S OFFICE,
August 19, 1853.

SIR: I have examined the papers which you were pleased to submit to me in the case of *The People of New York v. Anson Wing*, from which it appears that said Wing is under indictment for larceny alleged to have been committed by him in violation of the laws of the State of New York, and is now a fugitive from justice in the British Provinces; and application is made to you for process to obtain the extradition of said Wing.

Larceny is not among the cases provided for by any convention between the United States and Great Britain. The crimes enumerated in the treaty of 1842, which now governs the question, are murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged papers. It is, therefore, in these cases only, that, by treaty, either Government can claim the extradition of fugitives from justice taking refuge in the dominions of the other.

International Extradition.

It is the settled politic doctrine of the United States, that, independently of special compact, no state is bound to deliver up fugitives from the justice of another state. (See the authorities collected in Wheaton's Elements, p. 172.)

It is true, any state may, in its discretion, do this, as a matter of international comity towards the foreign state; but all such discretion is of inconvenient exercise in a constitutional republic, organized as is the Federal Union; and accordingly it is the received policy of this Government, to refuse to grant extradition except in virtue of express stipulations to that effect. (Mr. Legare's opinion, October 11th, 1841.)

I think it is unjust and unwise in point of principle for the United States to ask as an act of comity from any other Government what it refuses to do in the like case itself. We should, it seems to me, stand on the basis of complete reciprocity of right and equal justice in all our relations with foreign governments, doing as we would be done by, and demanding of them only what we are prepared to concede in return. That was the public doctrine of this Government in the days of our relative weakness, and it should the more plainly be so now in the time of our national strength.

Special reasons exist to dictate reserve in the matter of extradition. If the enumeration of cases for the claim of extradition, in existing treaties, be not sufficiently ample, it would seem better to enlarge the same, by further mutual stipulations, rather than at the mere discretion of the President.

I am, therefore, of opinion, that to grant the present application would be contrary to true doctrines of international law, and to the received practice of the United States.

I have the honor to be, very respectfully, your obedient servant,

(Signed,)

C. CUSHING.

The PRESIDENT.

DURATION OF COMMISSIONS.

In case of appointments and removals by the President, where the removal is not by direct discharge, or an express vacating of the office by an independent fact, but merely by the operation of a new commission or appointment, then the virtue of the old commission ceases only when notice of the new commission is given to the outgoing officer, either by the President, or by the new officer exhibiting his commission to the old, or by other sufficient notification.

ATTORNEY GENERAL'S OFFICE,

August 30, 1853.

SIR: The letter of the Honorable Grafton Baker, referred to me by you, presents the single question, at what time his salary as Chief Justice of New Mexico shall cease, his place having been filled by the appointment of the Honorable James J. Deavenport.

The facts are in brief as follows:

Mr. Baker left New Mexico on the 7th of April, 1853, and arrived at Washington with dispatches from the Governor of New Mexico, late in May; and here he learned authentically, at the State Department, that he had been superseded.

Mr. Deavenport was appointed on the 5th of April, 1853; but it is not yet known whether or not he has reached Santa Fe to enter upon the duties of his office.

The general rule of law is well settled that, in the case of appointments and removals by the President, when the removal is not by direct discharge or an express vacating of the office by way of independent fact, but merely by the operation of a new commission or appointment, then the virtue of the old commission ceases only when notice of the new commission is given to the outgoing officer, either by the President, or by the new officer exhibiting his commission to the old one, or by other sufficient notice. (*Bowerbank v. Morris*, Wallace's Rep., 118-133.)

If, therefore, Mr. Baker had remained in New Mexico, he might have continued to perform the duties of Chief Justice and to receive the salary, until the arrival of Mr. Deavenport, or until he received other legal notice to terminate his functions.

Being absent from the Territory, however, Mr. Baker became subject to the operation of the act of Congress, which

Pensions—Brevet Rank.

forbids the payment of salary to any territorial officer who shall have been absent from his Territory for more than sixty days, unless the President of the United States shall certify officially his opinion that the absence of such officer has been for good and sufficient cause. (Act of June 15th, 1852, ch. 49, ses. Laws, p. 10.)

Under these peculiar circumstances it seems to me just and equitable to allow the salary of Mr. Baker to the time at or about which, by inquiry at the State Department, he received information there of the appointment of Mr. Deavenport; which time is not exactly stated, but for convenience sake may be assumed as the 1st of June.

Upon these premises, there is no occasion for the certificate of the President in the case, the period of Mr. Baker's absence from the 7th of April to the 1st of June not amounting to sixty days; and his account can be settled in the regular course of business at the Treasury, provided the foregoing view of the subject be approved by the President.

I have the honor to be, very respectfully, your obedient servant,

C. CUSHING.

The PRESIDENT.

PENSIONS—BREVET RANK.

The date of the invalid pension of an officer of the Army depends on the lineal, not the brevet, rank, of such officer.

ATTORNEY GENERAL'S OFFICE,

August 30, 1853.

SIR: The case of Br. Major McReynolds, submitted to me by your letter of the 13th instant, presents the following facts:—

Andrew T. McReynolds was a captain in the third regiment of dragoons in the service of the United States, during the war with Mexico, and on the 20th of August, 1847, was wounded in action, and in consideration of his meritorious conduct on this occasion, he was duly brevetted as major; his brevet commission to take effect from that day; and after-

Pensions—Brevet Rank.

wards, namely, on the 31st of July, 1848, he was honorably discharged from the service of the United States.

Being totally disabled by this wound, Br. Major McReynolds has been inscribed on the pension roll at the rate of twenty-five dollars per month, to commence on the 1st of August, 1848, the day on which the evidence on his application was completed, that rate being the half-pay of a captain of dragoons.

He now claims that he is entitled to be pensioned at the rate of thirty dollars per month—the half-pay of a major of dragoons—on the ground that his brevet rank relates back to the 20th of August, 1847, although subsequently conferred; and the question is of his legal rights in the premises.

The act of Congress, under which this officer became entitled to a pension, refers to and in effect adopts the 14th section of the act of 1802, (ii Statutes at Large, 135,) which provides that “the compensation, to be allowed for such wounds or disabilities to a commissioned officer, shall not exceed, for the highest rate of disability, half the monthly pay of such officer at the time of his being disabled or wounded;” and as the monthly pay of the party, at the time of his being disabled, was only that of a captain of dragoons, on the surface of things the conclusion would seem to be irresistible that such must be the measure of his pension; and this conclusion is confirmed by consideration of the laws regarding brevet rank, and those relative to the subject-matter.

Brevet rank does not as of course carry with it the pay and emoluments of the rank indicated by the brevet commission; for the acts of Congress establishing brevet rank are with a proviso that no additional pay or emoluments shall follow, except when the party is commanding a separate post, district, or detachment, according to the act of July 6th, 1812, (ii Stat. at Large, 785,) or when he is on duty, and has a command according to his brevet rank, according to that of April 18th, 1818. (iii Stat. at Large, p. 427.)

Now the brevet rank, conferred on this officer, has relation back, it is true, to the day when the disability was incurred, but still, though the utmost effect and force of this resiliency be conceded, even to the degree of supposing him to have been

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actually brevetted upon that day, yet, as a point of fact, he was not, on that occasion, in command of a separate post, district, or detachment, nor otherwise on duty or commanding in the rank of major; and therefore he does not come within the necessary statute conditions to enable him to be deemed and construed as entitled to the pay of major at that time, or to the legal consequences of a right to such pay.

He was, on that day, entitled to the pay of captain, and no more; and that fact must fix the rate of his pension.

To the contrary of this, there is nothing but one alleged precedent. Among the vast number of pensions, which have been allowed to invalids, for disabilities partial or total, incurred in the war of the Revolution, and in all the subsequent wars, comprising a great number of brevetted officers, one case has been found, and is insisted on as a precedent fit and proper to entitle Br. Major McReynolds to be pensioned according to his brevet rank, rather than his actual rank of commission and service at the time. It is the case of Jonathan Keaweley, who, according to the report from the Pension Office, was captain in a regiment of rifles on the 20th of August, 1814, and on that day lost a leg in battle, and was afterwards appointed assistant adjutant general, with the rank of major of cavalry, and for the disability incurred on that occasion was pensioned according to his constructive rank of major.

This case is an exceptional and very anomalous fact merely, not a doctrine. It has not been followed heretofore, and ought not now to be followed, as a legal precedent. It was merely an act of improvidence, an official error, in palpable violation of the written law of the land.

My opinion, therefore, is, that the Commissioner of Pensions proceeded rightfully in the case of Br. Major McReynolds; that the pension allowed him being measured by the pay of a captain, is according to law, and that it would be contrary to law to increase it by relation to his brevet rank.

I am, very respectfully, your obedient servant,

(Signed,)

C. CUSHING.

Hon. ROBERT McCLELLAND,

Secretary of the Interior.

International Extradition.

INTERNATIONAL EXTRADITION.

The opinion of the Supreme Court of the United States, in *Kaine's case*, (How. p. 103,) considered in relation to the action of the President.

Any foreign Government entitled by treaty to the extradition of a fugitive from justice may apply to the courts in the first instance; but, if requested, the President will issue the previous authorization held to be necessary by a portion of the court in *Kaine's case*.

On a party being arrested for extradition and brought before a magistrate, that magistrate examines the case judicially; and his decision is not subject to any direction on the part of the President.

Hence, the question of remanding the prisoner for further examination, and the time of remanding, are questions for the magistrate to determine.

The alleged fugitive may be arrested a second time on a new complaint, either with or without a new warrant of the President.

The question of the general power of a magistrate to remand, discussed.

ATTORNEY GENERAL'S OFFICE,

August 31, 1853.

SIR: I have considered the question presented by your note of yesterday.

It appears that on application in behalf of the British Government, duly made to that of the United States, a mandate issued on the 12th instant, in the name of the President, calling on certain magistrates therein designated, or any one of them, to cause William Calder, charged with the crime of forgery committed in Great Britain, to be arrested as a fugitive from justice, and to examine the evidence of his criminality, and if the charge should be sustained, to certify the same to the President, to the end that said Calder may in such case be surrendered to the proper authorities of the British Government.

This mandate, the issue of which is a departure from the recently pre-existing practice of the Government, seemed to me to be called for by the action of the Supreme Court of the United States in *Kaine's case*, (*In re Kaine*, xiv Howard, p. 103;) for although the necessity of such a mandate is not the thing specifically passed upon by the court in that case, yet the views, expressed by some of the members of the court as to the true course of proceeding in such cases, and the analogy of the practice in Great Britain itself, led to the conclusion on the part of the President, that, in a case of claim for extradition falling within the scope of any treaty provision, it was proper

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for this Government, on being requested by the foreign government desiring extradition of an alleged fugitive from its justice, and reasonable cause in the premises being shown, to move to action the proper judicial authorities of the country, in order to the arrest and lawful examination of the party charged with crimes, and the investigation thereof for the information of the Government.

So that,—whereas, heretofore, the party desiring the extradition of an alleged fugitive from the justice of a foreign government went, *in the first instance*, to some one of the officers designated in the act of Congress of the 12th of August, 1848, entitled “an act for giving effect to certain treaty stipulations between this and foreign governments for the apprehension and delivery up of certain offenders,” and sued out a warrant of arrest and pursued the other requisitions of that act,—now, in the spirit of the opinions expressed by Mr. Justice Nelson especially, in Kaine’s case, the party may, if he please, commence by applying to the President of the United States for a mandate, which being granted, the act of Congress above cited then takes up the case, and pursues it to the conclusion corresponding to the particular facts, and to our treaty obligations towards the given foreign government.

I say here, in repetition, substantially, of the idea before intimated, that the foreign government may, *if it please*, apply to the President for a mandate. The Federal Government does not require this, but only stands ready to it if required by the foreign government.

For, when carefully analyzed, the decision in Kaine’s case appears to be this:—Thomas Kaine charged as a fugitive from the justice of Great Britain within the treaty, was arrested by one of the Commissioners in New York, appointed by the Circuit Court of the United States to take affidavits and examinations, and committed to abide the order of the President.

Thereupon a writ of *habeas corpus* in the matter was issued by the Circuit Court of the United States, and, upon a hearing before the District Judge, dismissed. After this, another writ of *habeas corpus* was ordered by Mr. Justice Nelson at chambers, and a hearing thereon reserved by him to be had before the Supreme Court of the United States in banc. On the argument of the case, eight judges being present, four of these,

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(Justices Catron, McLean, Wayne, and Grier,) declared, through Mr. Justice Catron, that in their opinion the proceedings before the Commissioner were correct, and the party had been rightfully committed for extradition, but that the Supreme Court had no jurisdiction of the *habeas corpus*; Mr. Justice Curtis, for other reasons assigned by him, came to the same conclusion as to the precise question before the Court; and Mr. Justice Nelson, and the Chief Justice and Mr. Justice Daniel, for whom he spoke, were of opinion that the proceedings before the Commissioner were incorrect, and that the Supreme Court had jurisdiction of the writ of *habeas corpus* to revise the question of the lawfulness of Kaine's commitment.

Now, it was in the consideration of the question of *jurisdiction*, the only thing decided by the Court, that discussion came up, arguendo, as to the rightfulness of the proceedings before the Commissioner. Mr. Justice Nelson, with whom were the Chief Justice and Mr. Justice Daniel, expressed the conviction that a previous mandate from the President was necessary, and that no Commissioner could lawfully act unless appointed specially *ad hoc*, while the contrary was held by Mr. Justice Catron, with whom were Justices McLean, Wayne, and Grier; and Mr. Justice Curtis expressed no opinion upon these points. The only thing authoritatively adjudged, therefore, by five judges out of eight, was that the Supreme Court had not jurisdiction.

Now, the decision in Kaine's case not definitively establishing the necessity of such a mandate, and that alleged necessity being a part of the argument only, and that of a minority of the court, the Minister of the foreign government has the faculty, still, to go to some lawful magistrate in the first instance, and take his chance of what may be ultimately adjudged to be the law in the premises. But if the foreign government desire to be relieved of this hazard, the President has the power, and in the exercise of a just comity, and especially in the discharge of his whole obligation to see to the faithful observance of treaties, he will, when occasion requires, proceed to give his mandate, by which the foreign government will be relieved of the difficulty arising on the opinion of Mr. Justice Nelson and others of the judges of the Supreme Court of the United States.

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In the present case, a warrant of arrest had been issued by the Honorable John W. Edmonds of the Supreme Court of the State of New York, who certifies to the President, under date of the 23d instant, that he has had the fugitive before him, and has heard the case upon evidence and argument, and is of opinion that there is not evidence enough of the criminality of the said Calder, according to the laws of the State of New York, to justify his apprehension and committal for trial for the office charged, if the same had been committed in said state.

Mr. Justice Edmonds reports the evidence in the case, and supports his conclusion in a carefully drawn opinion, independently of which the precise question before him was one exclusively within his province as a judge to determine; and upon his report, whether his opinion of the effect of the evidence be erroneous or not, it is clear the President cannot order the surrender of the said Calder.

But another question arises upon a second report of Mr. Justice Edmonds; for it appears that a motion has been submitted to the court to remand the party until new evidence can be obtained from Great Britain to maintain the charge:—to grant which application the court has decided not to be within its province, the same vesting, if anywhere, in the Government of the United States. Upon which, the Minister of the British Government here applies to the Secretary of State, requesting “That directions may be given for the retention of the prisoner in custody for the time required” for the procurement of “further evidence;”—and the inquiry thus presents itself is of the duty and the power of the President in this behalf.

His general duty in this case, of course, is that which the tenth article of the treaty with Great Britain imposes, namely, to “deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper,” committed within the jurisdiction of Great Britain, shall seek an asylum in the United States. (Treaty of August 9th, 1842, viii U. S. Stat. at Large, 576.)

But this, by the terms of the treaty, is to be done upon such evidence of criminality, as, according to the laws of the place where the alleged criminal shall be found, would justify his

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apprehension and commitment for trial, if the crime or offence had been there committed; and the judges and other magistrates, thereto lawfully authorized, are to cause the arrest of the party charged, hear and consider the evidence; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, the examining judge or magistrate is to certify the same to the Executive.

In like manner, the act of Congress, which is in execution of, and subordinate to, the treaty stipulations of this class, commits to the judge or magistrate the duty and power of arrest of the party, his examination, the hearing of the evidence, and the determination of the questions, upon which, if at all, the surrender of the alleged criminal is to be made.

That is to say, in the execution of this treaty, as of other treaties of the same class, the arrest, examination, and decision of fact, are judicial functions and acts. They are not, and they cannot be, performed by the President.

Now, the arrest, examination, and decision being purely judicial acts, it follows, although the act of Congress, like the treaty, is silent on this point, yet that the rules of procedure must conform to the law of the land in such matters. What is to be deemed "sufficient evidence" to sustain the charge, is a question for the judge or magistrate to decide, according to the laws of the place where the criminal may happen to be examined. So, also, is the question, on what day he will sit, what adjournments he will grant, and whether he will remand the party charged for a further examination.

All these are things over which the President has no control, and as to which he can give no command. He cannot arrest the alleged criminal; he cannot judge the question of his guilt; he cannot regulate the discretion or conscience of the examining magistrate.

True, the President may, as in this case, issue his mandate for the commencement of the proceedings in the United States; but that mandate is facultative only; it serves, on the hypothesis of the legal conclusions of Mr. Justice Nelson, to give jurisdiction; but that jurisdiction, when thus called into life by the President, rests exclusively with the magistrate making the arrest and examination. If he certifies the criminality of

the accused, then the President is to order a surrender, otherwise there is the end, *pro hac vice*, of the duty and the power of the President.

Nor can appeal be taken from the decision of Mr. Justice Edmonds to any other court, so as to revise that decision. The judge or magistrate in this case acts by special authority under the act of Congress; no appeal is given from his decision by the act; and he does not exercise any part of what is, technically considered, the judicial power of the United States. (Ex parte Metzger, v Howard, 176; United States v. Ferreira, xiii Howard, 40, 48, per Ch. J. Taney; In re Kaine, xiv Howard, 103, 119, per Mr. Justice Curtis.)

Indeed, by the municipal law, as well of England as of the United States, the judgment upon the evidence on the preliminary examination of a party accused, as also the mode of conducting the inquiry, including the question of remanding the party, are, in general, matters within the discretion of the magistrate, that discretion being a wise one of course, and guided by the precedents and doctrines of law, but still not subject to appeal as such to another magistrate or court. (i Chitty's Crim. Law by Perkins, p. 89; i Archbold's Crim. Prac. by Waterman, p. 44; ii New York Revised Stat. p. 789.)

I feel constrained, therefore, to come to the conclusion, that the President has no power to revise the action of Mr. Justice Edmonds, or to order the detention of Calder.

However inconvenient this may be to the authorities of the British Government in the present instance, the inconveniences are obviously reciprocal and inevitable. The two Governments have by treaty agreed to make the question a judicial one; and they could not do otherwise; for the Government of the United Kingdom is a constitutional one, as well as that of the United States; and in both countries the writ of *habeas corpus* presents itself as the safeguard, in the hands of the judges, of individual freedom against all possible encroachments on the part of the executive.

I do not perceive how a different conclusion could be reached, upon a similar case, arising in the United Kingdom. The tenor of the statute there is, that on requisition of the United States, any principal Secretary of State, or certain other

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executive authorities designated, shall issue a warrant to signify that such requisition has been so made, and to require all magistrates and officers of justice to govern themselves accordingly, and to aid in apprehending the person accused and committing him to jail, for the purpose of being delivered up to justice; and thereupon, proceeds the statute, it shall be lawful for the proper magistrate to examine upon oath any persons touching the truth of the charge, and upon such evidence, as, according to the law of the place, would justify the apprehension and commitment for trial of the person accused of the crime, had it been committed in that jurisdiction, the magistrate is to commit the accused to jail, there to remain until delivered up in pursuance of the requisition of the United States. (vi and vii Vict. ch. 76, s. 1.) There is no indication here of any power on the part of a principal Secretary to arrest the alleged fugitive, or to direct the examining magistrate, or to require the detention of the accused for further examination. All he is empowered by the act to do is to issue a warrant "to signify that such requisition has been made," upon which, magistrates and other officers of justice are to govern themselves according to the provisions of the treaty and the laws of the land.

One thing only, it seems to me, can be done in behalf of the British Government. Mr. Crampton may, undoubtedly, cause a new complaint to be entered against Calder, and apply for a new warrant of arrest, either with or without a new mandate from the President. Calder has not been tried. He has been examined by a magistrate, and the evidence is adjudged to be insufficient to justify his extradition. But, upon a new complaint, he may be examined anew by the same or by another magistrate, and the exhibition of additional evidence may lead to the conclusion of his criminality and the certificate thereof to the President.

Permit me, in conclusion, further to suggest, with all proper deference for the opinions of Mr. Justice Edmonds, whether he has not power to remand Calder; that is, if, in his judgment, the circumstances of the case, and the present stage of the examination, justify it. Of the general power of a magistrate to remand for examination, there can be no doubt of course, it being the familiar practice of magistrates; and cases are not

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wanting of prisoners being detained more than twenty days between their first appearance and their commitment for trial, and being brought up for examination several different days during the interval. (i Chitty's Crim. Law by Perkins, p. 73; i Archbold's Crim. Prac. by Waterman, p. 36.) The authority to do this has been recognised in New York, in the case of a State magistrate, examining for a crime charged against the United States. (*Ex parte Smith, v Cowen*, 273.) In Massachusetts it is regulated and allowed by statute. (Rev. Stat. ch. 135, p. 9.) It is true that some adjudications have been made in England, which subject the magistrate who remands, to an action for alleged unreasonableness of time, even when no improper motive is pretended. What is a reasonable time is a mixed question of law and of fact, depending upon the probability of obtaining further and competent evidence. What is reasonable, Mr. Justice Bayley observes, on one occasion, does not rest in the discretion of the magistrate: there may be cases in which three days might not be a reasonable time,—and yet there may be cases where three months might be reasonable. (*Davis v. Capper*, iv Carrington & P. 443, note.) But the magistrate acts, in the question of remanding, under the peril that, on trespass being brought, a jury, with proper instructions from the court, shall find the time of imprisonment to have been unreasonable, (*Davis v. Capper*, ubi supra; *Davis v. Capper*, x Barn. & Cr. 28;) which the more conclusively shows that the whole question, here, is within the jurisdiction of Mr. Justice Edmonds. And if, having once decided the question of criminality, and made report thereon to the President, the judge should be of opinion that it is too late for him to entertain a motion for delay, and to remand the party until further evidence be procured, it does not seem to me that his doing so can be subject to any just exception on the part either of his own Government or that of Great Britain.

I am, very respectfully, your obedient servant,

(Signed,)

C. CUSHING.

Hon. WM. L. MARCY,
Secretary of State.

Case of Spratt's Hemp Contract.

CASE OF SPRATT'S HEMP CONTRACT.

The distinction in the administrative law of the United States, between purchase in open market, and by contract, discussed and defined.

The law requires that executory contracts for supplies and materials for the Departments shall be duly advertised.

The invalidity of the contract of the Navy Department with Spratt for hemp reaffirmed. See ante, p. 40.

ATTORNEY GENERAL'S OFFICE,

September 5, 1853.

SIR: At the request of the Hon. George A. Caldwell, counsel of the party interested, I have revised and reconsidered the opinion given by me the 3d of June last, on the case stated by you, as to the legality of a contract made by the Navy Department on the 21st of February last, for the supply of American water-rotted hemp by Mr. Spratt.

I expressed the opinion, at that time, that the contract in question was entered into by the Navy Department without lawful authority; and, on further and careful reflection, I adhere to that opinion.

The legal question involved is, whether the provision of the resolutions of May 9th, 1848, (ix Stat. at Large, 334) which empowers the Department to contract for American hemp, was constructively repealed or not, by the subsequent provisions, *in pari materia*, of the act of September 28th, 1850, (ix Stat. at Large, 513,) and of that of March 3d, 1851, (ix. Stat. at Large, 621,) which still enable the Department to buy American water-rotted hemp, but require this to be done by purchase in "open market." If, as it is assumed in that opinion, purchase by contract for five years, and purchase in open market, are different and incompatible things, then the conclusion therein follows of necessity, and the resolution of 1848 is to be considered as repealed, and all action under and by virtue of it null and of no effect. I did not go into detailed argument of this difference and incompatibility, because holding that to be settled by the language of the statutes, the ruling of my predecessors, and the practice of the Government.

The distinction between open purchase, or purchase in open market, and contract, begins with the act of March 3d, 1809,

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amending the several acts for the establishment and regulation of the Treasury, War, and Navy Departments, (ii Stat. at Large, 536,) which act requires (sec. 5) "that all purchases and contracts for supplies or services, which are, or may, according to law, be made by or under the direction of either the Secretary of the Treasury, the Secretary of War, or the Secretary of the Navy, shall be made either by open purchase, or by previously advertising proposals respecting the same."

This act has been repeatedly passed upon by preceding Attorneys General. The leading opinion is that of Mr. Berrien, (August 29th, 1829, Opinions, ante, vol. 2, p. 257.) He lays down the rule that all such services or supplies as are to be rendered or furnished *at a future day*, are to be contracted for on proposals previously advertised, which is one condition of the act; and articles of which the exigency is immediate, and delivery needed at once, may be obtained by "open purchase," which is the other condition of the act. And he carefully distinguishes the two things as different and distinct processes; defining open purchase to be, in the analogy of market overt, or open market, as the phrase is in the acts of 1850 and 1851, where the article is bought publicly, in the ordinary mode of purchase between individuals, and at places where goods of like description are ordinarily sold.

This view of the subject is adopted and reaffirmed by Mr. Grundy, (March 25th, 1839, Opinions, ante, vol. 3, p. 427,) and is the received law in the general practice of the Departments.

I have treated the phrase, "open purchase," of the act of 1809, and the phrase, "purchase in open market," of the acts of 1850 and 1851, as meaning the same thing. "Open purchase" had already, as we have seen long before the year 1850, acquired the construction of "purchase in market overt." But, if anything is to be inferred from changed phraseology in the later acts, it is not in favor of the present contract, the power to buy hemp of the description embraced in this contract being limited by the more cogent of the two phrases, namely, "purchase in open market."

I am well aware of the fact that the common law notions of market overt, as bearing upon the question of the validity of the sale of personal property, have not been adopted in this

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country. (*Ventress et al. v. Smith*, x Peters, 161, 175, per Mr. Justice Thompson; *Towne v. Collins*, xiv Mass. R. 500; *Baldwin v. Darne*, viii Mass. R. 500; *Wheelwright v. Depeyster*, i Johnson, 471, 480; *Easton v. Worthington*, v Serg. & R. 130; Long on Sales, by Rand, 164-175; Chitty on Contracts, by Perkins, 838.) But all the effect of these authorities, and of a number of others of the same class which might be cited, especially of decisions in the State of New York, is only to restrict, here, the application of the English doctrines regarding the exceptional case of market overt to the question of the validity of sales of chattels by one who is in wrongful possession, or otherwise without lawful power to sell. The *idea* of market overt does not the less exist among us, at least, as description of a *form of sale*.

The supposition that *market overt*, as description of a *thing*, cannot exist in the United States, is an erroneous inference from the primitive nature of market overt,—that is, a periodical public fair and market in the country, held in a particular place, by virtue of charter or prescription, (Com. Dig. Market E.; ii Bouv. Dic. Market.) But, from a very early period, sale in market overt, in London, came to mean sale, in any open shop, of goods usually sold therein, (*The Case of Market Overt*, v Co. 836;) and it is now understood of sale in a common warehouse appropriate to the trade of the occupier, whether in rooms open to the observation of passers by or not. (*Lyons v. De Pais*, xi Ad. & E. 326. See iv Bac. Abr., by Bouvier, Fairs E.) In a word, open purchase, or purchase in open market, as a phrase descriptive, has unquestionably the import already cited as being ascribed to it by Mr. Berrien.

As a consideration of construction, it has been suggested further, that every act of purchase is a *contract*, and that, therefore, purchase by contract, and purchase in open market, are not incompatible things, so as that the enjoining of the latter by Congress shall be tantamount to the prohibition of the former.

I reply, that the two things are in fact carefully distinguished by the act of 1809; that Congress must not be presumed to have employed expressions of mere tautology or pleonasm; that the two phrases are placed in apparent contradistinction one from the other; that each is plainly susceptible of a

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distinct construction; that they have received this by authoritative exposition; that the acts of 1850 and 1851, in recognising the distinction, fortify that recognition by employing the language of Mr. Berrien's exposition, in place of that of the act of 1809; and the acts of 1809, 1850, and 1851, were each and all aimed at a notorious mischief, namely, contracts for future delivery of supplies made by any of the Departments privately, or, which is the same thing, without advertising for proposals. This assumed statute meaning of the word "contracts" is maintained, as we shall presently see, through the analogous acts of Congress. (*E. g.*, vide act of March 3d, 1845, s. 12, v Stat. at Large, 795.)

When my previous opinion was prepared, being satisfied of the invalidity of the contract in question, upon the facts of the case stated, it did not seem to me necessary to make certain suggestions on the subject, which lie beyond the terms of the case itself, perhaps, but which present themselves upon the accompanying papers.

One is matter of argument merely, corroborative of the foregoing views. It is the clause in the contract, which authorizes the party, if he cannot deliver American hemp, to deliver European hemp instead. To be sure, this alternative condition is, it is believed, for the first year of the contract only; but it is not the less plainly illegal; for the sole effect is to give the contractor a monopoly, for the present year at least, of the delivery of European hemp, in violation of the letter and spirit of acts of Congress.

The remaining consideration is a more serious one still. Were proposals advertised for this contract? Nothing is said on this point in the case laid before me, and the papers do not show any advertising. If, on examination, it should be proved that no proposals were issued, that alone would be a fatal objection; for the resolution of 1848, which authorized contracts for five years, did not repeal the conditions of the act of 1809 in regard to all contracts on time, that is, previous advertisement for proposals. The very mischief, which that law proposed to remedy, was private contracts, that is, contracts not advertised. (Mr. Berrien, *ubi supra*.)

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I continue of opinion, therefore, that the contract in question is without law, and not binding on the United States.

I am, very respectfully,

C. CUSHING.

Hon. JAS. C. DOBBIN,
Secretary of the Navy.

COLLIER'S CASE.—JURISDICTION OF FEDERAL AND STATE COURTS.

James Collier, being indicted in the District Court of the Northern District of California on the charge of feloniously converting to his own use public money, intrusted to him as Collector of San Francisco, and being arrested in the State of Ohio by warrant of the District Judge of the United States in order to be carried to California for trial, was taken from the United States Marshal by *habeas corpus ad subjiciendum* granted by a judge of the State of Ohio.

Held, that the act of the State court was an act of unlawful interference with the jurisdiction of the courts of the United States.

When a party is lawfully in custody under judicial authority having apparent jurisdiction of the subject-matter, no other court is collaterally to take jurisdiction of the case under cover of the writ of *habeas corpus ad subjiciendum*, even as between courts of the same sovereignty or jurisdiction.

A fortiori, a prisoner cannot be withdrawn from the jurisdiction of a State by *habeas corpus* issued by the courts of the United States, nor from that of the United States by *habeas corpus* issued by the courts of a State.

The courts of the United States are the rightful judges of their own jurisdiction.

The separation of an existing judicial District of the United States into parts does not take away the right to try offences previously committed in either subdivision of the District.

A judicial tribunal of the United States may have jurisdiction of crimes committed before its organization by Congress.

Laws which recognise or otherwise modify the judicial tribunals of the United States are not *ex post facto* laws within the scope of the prohibitory clause of the Constitution.

ATTORNEY GENERAL'S OFFICE,

September 9, 1853.

SIR: I have considered the matters indicated by your letters of the 2d and 6th instant, and the documents accompanying the same.

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It appears that, at the June term, 1853, of the District Court of the United States for the Northern District of California, James Collier was indicted by finding of the grand jury for feloniously converting to his own use \$300,000 of the public money of the United States, intrusted to him as Collector of the Customs for the Collection District of Upper California.

The indictment contains several counts, all charging the felonies to have been committed on the 3d of April, 1850, at San Francisco, within the jurisdiction of the District Court of the United States for the Northern District of California.

James Collier was afterwards arrested in the State of Ohio, by warrant of the District Judge of the United States for the District of Ohio, issued in pursuance of the 33d section of the act of Congress of the 24th of September, 1789, (i Stat. at Large, 91,) based upon an authenticated transcript of the record of the indictment and addressed to the Marshal of the District of Ohio, commanding him to arrest said Collier and to remove him to the Northern District of California, and there deliver him into the custody of the Marshal thereof, to be dealt with according to law.

Whilst the Marshal of the District of Ohio had Collier in custody, he was served with a writ of *habeas corpus*, issued on the 9th of August, 1853, at the prayer of Collier, by the Hon. Thos. L. Jewett, a judge of the Court of Common Pleas of the State of Ohio, in obedience to which writ of *habeas corpus*, the Marshal returned the body of Collier before the said judge of the Court of Common Pleas, with an authenticated transcript of the record of the indictment against Collier in the said Northern District of California, together with the warrant issued by the District Judge of the United States for the District of Ohio, as the cause of the detention of said Collier.

Thereupon the judge, on the motion of the Marshal, ordered that the hearing of the return to the writ of *habeas corpus* be adjourned until the first day of the next term of the Court of Common Pleas for the county of Jefferson; and Collier was admitted to bail for his appearance then and there, and to abide the order of the court, the recognisance of himself and sureties being in the small penalty of 5000 dollars, payable to the State of Ohio.

Upon these facts, you desire my opinion as to the legality of the proceedings of the State judge, and whether there is any remedy, and what it is, which the Government may pursue, in order to bring the said Collier to trial under the indictment in California.

The question which lies at the very threshold of this case, namely, under what circumstances the judicial power of a State may issue the writ of *habeas corpus* to inquire into the detention of a person under authority of the United States, and to determine the legality of such detention, has not been passed upon by the Supreme Court of the United States, and is not very clearly determined in the courts of the several States themselves, although it has repeatedly arisen there in one form or another, (Serg. Const. L. 282.) But a careful analysis of the several decisions, and a classification of them, will furnish reliable doctrine for the present inquiry.

The first appearance of the question is in the case of certain persons arrested by General Wilkinson at New Orleans, as commander of the forces of the United States there, and, by him transferred to Baltimore, and detained at Fort McHenry to await the orders of the Secretary of War, on the charge of treasonable practices in connection with Aaron Burr. On process of *habeas corpus ad subjiciendum*, Ch. J. Nicholson, of Maryland, discharged these persons on the ground that their arrest and their detention were without even color of right or authority. (Cited in Roberts's case, ii Hall's L., p. 195.) Afterwards, in the case of an alleged unlawful enlistment in the Navy, the same court held that it had no right to interfere, the enlistment being under the Constitution and laws of the United States. (Roberts's case, *ubi supra*.) And on application being made to the Supreme Court of New York, for a *habeas corpus* to try the validity of an enlistment in the Army of the United States, the court refused the writ, Ch. Justice Kent arguing with great force that the courts of the United States alone had jurisdiction in the matter; while the other judges dissented on the question of jurisdiction, but agreed on the inexpediency of taking jurisdiction as a point of discretion, since the party, if aggrieved, might have relief by applying to one of the judges

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of the Supreme Court of the United States. (Matter of Ferguson, ix Johnson, 239. See also Husted's case, i Johnson, 136.) But, subsequently to this, the question of jurisdiction, as applied to enlistments in the Army (or Navy) of the United States, was definitely settled, so far as a long series of decisions of the States can go, in favor of the jurisdiction of the courts of the States, by adjudications, first in Pennsylvania, (Commonwealth v. Murray, iv Binney, 487,) then in Massachusetts, (Commonwealth v. Harrison, xi Mass. R., 53, and Commonwealth v. Cushing, xi Mass. R., 66,) then in New York, (Matter of Carlton, vii Cowen, 471,) New Jersey, (The State v. Brearly, ii Southard, 555,) New Hampshire, (The State v. Dimick, ix N. Hamp. R., 194,) and again upon argument in Pennsylvania, (Commonwealth v. Fox, vii Barr, 336,) and probably in others of the States.

These decisions, limited to the special case of military enlistment, have been justified on the ground that a State cannot be deemed so far to have surrendered her independence as to be incapable of inquiring, through her tribunals, into the imprisonment of her citizens, no matter how illegal it may be, provided it be by agents of the United States, and under color of their laws, (per Southard, J., The State v. Brearly, *ubi supra*;) that if, on such inquiry, the laws of the United States justify the detention of the party, the court will adjudge accordingly; that if they do not, then it is not a case arising under the laws of the United States, but only colorably so; that a mere pretence of such authority neither gives exclusive jurisdiction to the courts of the United States, nor ousts that of the States, (per Parker, Ch. J. The State v. Dimick, *ubi supra*;) and that, if called on, it is the duty of the judicial courts of a State to see whether the party detained is lawfully so detained under the alleged authority and laws of the United States. (Per Coulter, J. Commonwealth v. Fox, *ubi supra*.)

There is another class of cases, in which the detention of the party, alleged to be held under authority of the laws of the United States, was by *civil* process, and not military enlistment. The Supreme Court of Pennsylvania, in a case where the party was detained under warrant of arrest of an alderman of Phila-

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delphia, charged with misprision of treason, had up the party on *habeas corpus*; and admitted him to bail on the single ground that the arrest was by the authority of an inferior magistrate of the State itself. (*Commonwealth v. Halloway, v Binney*, 512.) And in another case in Pennsylvania, where a party was held in arrest by the mere act of the Marshal of the United States as an alien, the court of that State proceeded to inquire into the rightfulness of the imprisonment. (*Lickington's case, v Hall's L. J.*, 92, 313.) The courts of Maryland, also, have entertained *habeas corpus* to inquire into and decide the lawfulness of an arrest for piracy, made by a justice of the peace of that State. (*Case of Almeida, Sergt. Const. L.*, 286.) But the contrary has been decided in South Carolina, where, in *habeas corpus*, the court of the State refused to go into the question of the constitutionality of an act of Congress. (*Ex parte Rhodes, Sergeant's Const. L.*, 284.) In the State of Georgia it has been expressly determined that the courts of the State will not grant a *habeas corpus* to discharge a person committed under an act of Congress. (*The State v. Plinn, T. U. P. Charlton*, 142.) And, even in the State of Pennsylvania, where the assertion of the jurisdiction of the courts of the State has been, as we see, sufficiently positive, so far as it goes, it is emphatically laid down, that, in a case where the District Court of the United States has jurisdiction, the courts of the State have no right to inquire into its judgment or interfere with its process—(per *Tilghman, Ch. J.*, *Ex parte Sergeant's Ex'r.*, viii *Hall's Law J.*, 206.)

The conclusion is, on the face of it, a reasonable one; and it is not believed that any decision or opinion, conflicting with this conclusion, is to be found, resting on respectable authority, in the adjudication of any of the States.

I think the view of this question taken by the General Court of Virginia, is, on the whole, the most complete and satisfactory, to wit: That a State court will issue the writ on the application of any party showing probable cause; that on the return thereof, the party will be held as lawfully restrained, if confined in obedience to any constitutional law either of the State or of the United States; that therefore the State court will neither discharge nor bail a party whose commitment is regularly made

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with view to a prosecution in the courts of the United States for an offence alleged, which is cognisable therein; and that in such case, although the State courts have concurrent jurisdiction with those of the United States in all cases of illegal confinement under color of the authority of the United States, yet the State court will not look beyond the warrant of commitment, issued by a competent court of the United States. (Ex parte Pool and others, Sergt. Const. L., 286.)

Well, therefore, might the Supreme Court of Massachusetts, in a recent case, doubt whether it was competent for it, by a writ of *habeas corpus* to a marshal to take a prisoner from the custody of another tribunal, court, or magistrate of whom such marshal is the executive officer, (Sims' Case, vii Cush. 285,) which same question arose in another late case of analogous facts in Pennsylvania, but passed off without authoritative decision. (In re Fisher, July 23d, 1853.)

In fine, it has never been pretended, and is against all reason to suppose, that, where a party has been formally indicted before a competent court of the United States for alleged violation of an act of Congress, and is arrested by warrant in due form to take his trial in such competent court of the United States, such party may be withdrawn from such trial by the *habeas corpus* power of one of the States. It cannot be done lawfully; the attempt to do it leads to unseemly conflict of jurisdiction; and it is not to be presumed that any judge of any State will perpetrate so flagrant a violation of the Constitution of the United States and the law of the land.

Nay, it may be assumed, as a general proposition in our system of law, that, where a party has been indicted on a true bill, found by a grand jury in any court having apparent jurisdiction of the subject-matter, no other court is collaterally to take jurisdiction of the case under cover of the writ of *habeas corpus ad subjiciendum*, even as between one court and another of the same State. (Commonwealth v. Winder, iv. Penns. L. J. 265.) *A fortiori*, if the indictment be found in a competent court of the United States, the prisoner cannot be withdrawn from its jurisdiction by *habeas corpus* returnable before a court of one of the States.

This negative conclusion may be applied to the present pro-

ceeding in two stages, first on the question of granting the writ, and secondly, on that of the final disposition to be made of it after due return.

I do not need to discuss the point, whether the State judge had or had not power to issue this writ in the circumstances of Collier's case. Nor do I need to determine whether it was or was not his duty so to do. Certainly the better practice, if not the received one, is, when the case for the petitioner itself shows that he is lawfully committed, then for the court in its discretion to refuse to grant the writ; for, if it appears on the petition that the petitioner is not entitled to relief, as it did by the papers annexed to the petition of James Collier, why obstruct the course of justice by requiring another hearing on the return? Of the better practice examples abound. (*E. g.*, *Ex parte Kearney*, vii Wheaton, 38.) Possibly in the present case, the State judge may, in granting the writ, have deferred to an erroneously supposed exigency of the statute law of his State. (Stat. of Ohio, Ch. 56.) But even if (which I do not concede) the statute of the State of Ohio were such as to have taken away the common law and the usual statute discretion in regard to the issue of the writ, still the statute of Ohio itself gives effect to the writ only in the case of persons *unlawfully* deprived of their liberty, and the return of the writ shows a commitment of Collier on formal process to answer to an indictment in the court of the United States. The State court, it seems to me, has no rightful authority to go behind this return of the marshal. The return shows a good and sufficient cause of detention, and the facts thereon stated must be taken as true by the judge of the State.

It has been adjudged that no part of the criminal jurisdiction of the United States can be delegated by Congress to the State tribunals. (*Martin v. Hunter's Lessee*, i Wheaton, 304.) Of course, the State tribunals cannot constitutionally have or exercise any part of that jurisdiction. To assume it would be mere usurpation. A State court has no jurisdiction even to enjoin the judgment of a court of the United States. (*McKim v. Voorhies*, vii Cranch, 279.) Nor can a State legislature determine the jurisdiction of the courts of the United States, or annul their judgments, or give to its courts the power to do this. (*United States v. Peters*, v Cranch, 135.) All these are primary ele-

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ments of constitutional law. To ascribe to a State court the power to annul or supervise the proceedings of the courts of the United States, would be to disregard all the theory of the Constitution and the supremacy of the treaties and laws of the Union; it would be to rest the ultimate appellate judicial power in the State courts instead of the Supreme Court of the United States, where it was lodged by the Constitution; there would cease, amid the conflicting decisions of the State courts, to be any settled construction of acts of Congress; the United States would be deprived of the power of enforcing their own laws by the instrumentality of their own tribunals; and the result would be mere confusion, insubordination, anarchy, and the overthrow of the Constitution.

It cannot be justly alleged that the accused is subject to any hardships by denial of the jurisdiction of the State court over his case; that denial would not deprive him of lawful redress; for, as well suggested by the court in Ferguson's case, (ix Johns. 241,) the party may have relief in *habeas corpus* by application to one of the judges of the Supreme Court of the United States or of the District Court of the District of Ohio, the exercise of whose jurisdiction in the matter would not involve a conflict of jurisdiction between the Federal and the State courts, a thing so much to be deprecated in all federative governments.

It belongs exclusively to the District Court of the United States for the Northern District of California to hear and determine the truth or falsehood of the facts charged on the indictment, and the State judge must proceed upon the hypothesis of a lawful indictment, as alleged in the return, a lawful warrant of arrest, and of course a lawful detention, making it his unquestionable duty as a judge to remand James Collier to the custody of the marshal for conveyance to California.

But suggestion appears in the case of an alleged want of jurisdiction in the District Court of California.

I do not think the State court has any right, on *habeas corpus* here, to consider that question.

The courts of the United States are the constitutional judges of their own jurisdiction. The judge of the District Court of the United States in California has taken jurisdiction here; if he has taken it wrongfully, that is for the courts of the United

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States to determine. No judicial tribunal of the State of Ohio can have, under the Constitution, rightful power to annul, adjust, limit or define the jurisdiction of the District Court of the United States in California or any other State. The undertaking of a State judge to do this, and to discharge the present prisoner on the ground that the District Court of the United States in California has not cognisance of the indictment instituted in that court, and found a true bill by the grand jury, would bring the judicial powers and jurisdiction of the General Government and of the State Government into direct conflict and contradiction in the same case, and upon a subject-matter where the United States indubitably have exclusive jurisdiction by unequivocal provisions of the Constitution. As well might a State judge sustain a writ of error to review and revise a decision of the Supreme Court of the United States. And such a power, if assumed at all, might as well be exercised after conviction and judgment as before, and would equally authorize the discharge of prisoners under sentence of the United States courts, to the utter extinction of the judicial powers which the Constitution of the United States granted to the Federal Union.

It would avail nothing to allege any authority of the States as such in the question, for the State judges, alike with those of the United States, are under oath to support the Constitution of the United States, (Const., Art. IV. ;) and the Constitution expressly declares that "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges of every State shall be bound thereby, anything in the Constitution and laws of any State to the contrary notwithstanding." (Const., Art. VI.) No law of the State of Ohio, so long as it remains a member of the Union, can abrogate the supremacy of the Constitution of the United States, or absolve the conscience of its judges from the obligation to give complete force and effect to the laws of the United States.

If, however, notwithstanding the many cogent considerations to the contrary, the judge of the court of Ohio, shall decide, in this case, to go behind the return, and look into the question of jurisdiction, the Government of the United States must of

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course acquiesce, and meet that question, as in my judgment it may, with undoubting confidence, as I will now proceed to demonstrate.

The statute, upon which Collier stands indicted, is entitled, "An act to provide for the better organization of the Treasury, and for the collection, safe keeping, transfer, and disbursement of the public revenue," approved August 6th, 1846. (ix Stat. at Large, p. 59, ch. 90.) By the general terms of the act, and its various provisions, it clearly is one of the "revenue laws" of the United States.

As Collier stands indicted for alleged violation of the 16th section of the Act, by indictment found June 30th, 1853, for a felony charged as committed at San Francisco on the 3d of April, 1850, there is no objection on the face of the proceedings by reason of the statute of limitations; for, being an offence against a revenue law, its limitation is five years by the act of March 26th, 1804. (ii Statutes at Large, 290, chapter 40, 5, 3.)

California having been ceded to the United States, or rather on conquest thereof having been recognised as part thereof by the treaty of Guadalupe Hidalgo, (February 2, 1848,) the revenue laws of the United States were thereupon extended to it, by act of March 3d, 1849, entitled "An act to extend the revenue laws of the United States over the Territory of Upper California, and to create a collection district therein." (ix Stat. at Large, p. 400, ch. 112.)

This act, approved March 3d, 1849, was, by its tenor, to take effect "from and after the tenth day of March next"; the next tenth day, not the next March; that is, the tenth day of the same March. Such, it is manifest, was the construction put upon the act by the United States; for James Collier was commissioned, by and with the advice and consent of the Senate, in the same month of March.

By virtue of this act, the act of August 6th, 1846, went into operation in California, and was in force there on the 3d of April, 1850, at which time the violations of this law are charged to have been committed by Collier.

The judicial system of the United States was extended over California by act of September 26th, 1850, (ix Stat. at Large, p. 521,) according to which act, California was divided into two

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judicial districts by the parallel of latitude 37° north, the districts to be called Northern and Southern. By the 2d section of the act the judge in each of the districts shall in all things have and exercise the same jurisdiction and powers, which were by law given to the judge of the Southern District of New York. By the 10th section it is enacted, that in addition to the ordinary jurisdiction and powers of a District Court of the United States, with which the Southern District of New York has been invested, the said courts be and are hereby invested, respectively, with the exercise of concurrent jurisdiction within the limits of its District, in all civil cases now exercised by the Circuit Courts of the United States."

It is unnecessary here to inquire into the ordinary jurisdiction and powers of a judge of the Southern District of New York of which the act speaks, because, which alone is material to the present question, the District Courts of the United States are invested with jurisdiction of all crimes the punishment of which is not capital; and the punishment of the offence of which Collier is charged is only imprisonment and fine. (ix Stat. at Large, p. 62.)

The act of 24th September, 1789, (i Stat. at Large, p. 76, chap. 20, sec. 9,) gives to the District Courts of the United States, exclusively of the courts of the several States, cognisance of all crimes and offences, which shall be cognisable under the authority of the United States, committed within their respective districts or upon the high seas, where no other punishment than whipping not exceeding ninety stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted. The 11th section of the same act gives to the Circuit Court of the United States exclusive cognisance of all crimes and offences cognisable under the authority of the United States, except where this act otherwise provides, and concurrent jurisdiction with the District Courts of the crimes and offences cognisable therein.

By the act of 23d of August, 1842, (v Stat. at Large, 517, chap. 188, sec. 3,) the District Courts of the United States shall have concurrent jurisdiction with the Circuit Courts of all crimes and offences against the United States, the punishment of which is not capital.

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Here, then, we have a statute in force forbidding the act charged, and making it indictable and punishable as a felony, and a court of competent jurisdiction as to place and powers. What objection is there to the jurisdiction, then, of the District Court of the Northern District of California?

The argument of the counsel for the accused is that the crime is alleged to have been committed before the District Court of the United States for the Northern District was established, and that therefore the court cannot have cognisance of the case:—to understand the bearing of which it is necessary to revert to the legislation of Congress on the subject of judicial courts in California.

The act of Congress already cited, of March 3d, 1849, for extending the revenue laws of the United States over California, provided, section fifth, that, until otherwise provided by law, all violations of the revenue laws of the United States, committed within the District of Upper California, shall be presented in the District Court of Louisiana or the Supreme Court of Oregon. (ix Stat. at Large, 400.)

After the people of California had formed their State Constitution, and been admitted into the Union as one of the States thereof, it is very clear that Collier, or any other person, could not have been tried in either the District Court of Louisiana or in the Supreme Court of Oregon for any felony or other infamous crime committed in California, because of the sixth amendment of the Constitution, which assures to the accused, in all criminal prosecutions, a speedy public trial by an impartial jury of the State or District wherein the crime shall have been committed.

Whether any felony or other infamous crime, which had been committed in Upper California, in violation of the laws of the United States, between the 3d day of March, 1849, when the revenue laws of the United States were extended over that Territory, and the 28th of September, 1850, when, as we have seen, the judicial system of the United States was extended over the State of California, would have been rightfully tried in Louisiana or in Oregon, it is unnecessary to inquire; for by the said act of September 28th, 1840, Congress repealed virtually the fifth section of the act of March 3d, 1849, and invested the District

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Courts of the Northern and Southern Districts of California with jurisdiction of all crimes against the United States not capital, in strict consonance with the above cited sixth amendment of the Constitution.

This act provides that "all the laws of the United States, which are not locally inapplicable, shall have the same force and effect within the State of California as elsewhere in the United States;" and also provides courts "for the purpose of trying all issues of fact triable by a jury," in either of said districts Southern or Northern; and therefore, as already explained in another relation, the District Court of the Northern District of California has apparent jurisdiction of the indictment, found by the grand jury a true bill against James Collier.

Now, the argument, re-stated upon these details of legislation, is, that because Congress has repealed the fifth section of the act of March 3d, 1849, which directed that all breaches of the revenue laws of the United States committed in Upper California shall be tried in the District Court of Louisiana or in the Supreme Court of Oregon, and instead thereof provided for the trial of such offences in the district wherein they were committed; therefore James Collier, for the alleged felony in the embezzlement of \$300,000 committed by him at San Francisco, in California, while he was Collector of the Customs in that collection district, shall not be prosecuted at all, but is to be taken as virtually amnestied or pardoned by the repeal of said fifth section and by the substitution of the District Courts of California for that of Louisiana or for the Supreme Court of Oregon, to have jurisdiction in California.

The consequence is not stated too strongly; for, if this be so, what other court has cognisance of this crime? Must not the crime go unpunished?

The act, when done, was a crime defined and punishable by statute in force at San Francisco. It was there punishable by and under the authority of the United States, which authority still continues over the place and the crime. The District Court of the United States for the Northern District of California, has, by the act of Congress creating it, cognisance of the offence charged in the indictment, and of all others of like kind, com-

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mitted against the laws of the United States within the territorial limits assigned to that court; and the jurisdiction of that court in the matter is exclusive of the powers of other courts. The State of California has no cognisance of the offence; for it was not an offence committed against the law, authority, or dignity of the State.

The suggestion of want of jurisdiction in the District Court is founded on a mere fallacy. It assumes that an after constituted tribunal cannot be rightfully invested with cognisance of crimes previously committed, nay, that if Congress have thought best to abolish the jurisdiction of one tribunal over a class of cases, and transfer to another the power to hear and determine the same, such legislation must be unconstitutional and void. The doctrine is entirely without countenance either in the common law, or in the municipal or public law of the United States.

The distinction between crime and remedy, between the right of a state to try, convict, and punish a crime, and the instrumentality by which it shall be done, exists in the nature of things. Neither the constitution of the court, nor the particular functions of the judge, belong to the essence of the crime, or to the right of the Government to try and punish.

Now, it is the rule of the common law that "the remedy may certainly be modified as the wisdom of the nation may direct" (*Sturges v. Crowninshield*, iv *Wheaton*, 122, 200; *Pearsoll v. Dwight*, ii *Mass. R.*, 84, 90; *Nash v. Tupper*, i *Caine's N. Y. R.*, 402; *Gubbs v. Harris*, i *Bibb*, 567, 569.) When a right exists, whether it be a public right to punish a crime previously defined by law, or a private right in property or person, the remedy may be modified at the discretion of the law-making power.

From time immemorial it has been the practice at common law to assign to new judicial commissioners or persons the cognisance of past transactions, criminal or civil. Thus, Sir William Blackstone says, that murders, whether in England or in foreign parts, may, by virtue of 33 Henry VII., ch. 23, be inquired of, and tried by the king's special commission in any shire or place in the kingdom. (iv *Blacks. Com.* ch. 23.)

So, in Kentucky, the court of appeals adjudged that, when a right had existed in the Commonwealth for a series of years,

without a remedy, that the act of the General Assembly, providing a remedy, was valid. (*Com'th v. McGowan*, iv Bib. 62.)

The course of legislation in the United States has uniformly proceeded on the principle that the cognisance of crimes and offences, committed within a defined territory or district of country, may be transferred and assigned to a new judicial tribunal established over the same territory or district of country. The opposite doctrine would require a government to continue the jurisdiction of existing tribunals for the mere purpose of hearing and determining former cases, although new tribunals might be greatly more convenient to the government and its citizens. It would, in effect, arrest, or at least grievously clog and embarrass all the improvements in the judicial system, which the progress of population, civilization, and experience, and the current of human affairs, render apt and wholesome, especially in such a country as the United States.

A brief review of the alterations in the organization and jurisdictional powers and limits of the courts of the United States will show that the doctrine, of a newly constituted court not being capable of receiving cognisance of crimes previously committed within the territorial sphere assigned to it, because of the legislative determination of the powers and jurisdiction of a former court within the same jurisdictional bounds, would be highly inconvenient, and in most instances totally subversive of justice.

At the establishment of the Federal Government, thirteen District Courts and three Circuit Courts were deemed sufficient for the administration of the civil and criminal justice of the United States. Then, the Supreme Court consisted of a chief justice, and five associate justices; the Circuit Courts were composed of any two justices of the Supreme Court with the District judge of the District wherein the Circuit Court was holden, any two of whom might constitute a quorum. (Act of September 22d, 1789, i Stat. at Large, p. 70, ch. 17.)

Now, various new District Courts have been added; original Districts have been subdivided, and a district judge appointed for each of such divided Districts; the Circuit Courts have been increased to the number of nine; three judges of the

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Supreme Court have been added; and the Circuit Courts are to be attended by only one justice of the Supreme Court, and may be held by him and the district judge of the particular District, or by either of them.

Then, the cognisance of crime by the District Courts was limited to certain offences against the United States, of which the punishment did not exceed thirty stripes, or one hundred dollars fine, or nine months imprisonment: now, their respective jurisdictions comprehend all crimes and offences against the laws of the United States, the punishment of which is not capital.

In many instances, the very existence of a previous system of tribunals has ceased, and all trace of their authority has passed away, as in the admission of Territories into the Union as States.

An act to provide for the more convenient organization of the courts of the United States, was passed February 13th, 1801, (ii Stat. at Large, p. 89,) which act made various alterations in the boundaries of the districts and circuits; provided for the appointment of circuit judges; dispensed with the attendance of the judges of the Supreme Court to hold the Circuit Courts; abolished the District Courts of the United States in and for the districts of Tennessee and Kentucky, and transferred (by sees. 10, 11, and 24) the powers, authorities, and jurisdiction, criminal and civil, of the abolished courts to the newly established Circuit Courts. Congress certainly did not intend that crimes, committed against the laws of the United States before this new judicial system was instituted, should go unpunished: and no one imagined that this new organization of the Courts could operate as a general amnesty of all previous crimes and offences, by reason of the new courts being incompetent in law to take cognisance of such crimes and offences, when prosecutions had not been instituted, or were instituted but not yet concluded.

This act, by the after act of 8th of March, 1802, was repealed, (ii Stat. at Large, 132,) and the pre-existing organization of the courts was re-established, with provision, that all proceedings, of whatever nature or kind, pending in any of the said repealed and abolished courts, should be continued, heard, and determined in the courts substituted and re-established thereby from

and after 1st July, 1801. Here, again, as to crimes and offences against the laws of the United States, committed between 13th February, 1801, and 1st July, 1802, upon which no prosecutions had been instituted during the judicial system organized by act of February, 1801, and before its repeal from and after 1st July, 1802, by act of March 8th, 1802,—it never was supposed that such crimes and offences were virtually pardoned or acquitted for want of competency to take cognisance of them on the part of the re-established courts.

The absurdity of assuming that a change of tribunal is a condonation of all offences previously committed, and the monstrousness of its consequences in preventing beneficial changes in the law, may be illustrated by consideration of the ancient trials in England by battle or by ordeal. (iv Blacks. Com., 342.) If the argument for Collier be valid, all such existing tribunals and forms of trial must be continued indefinitely for the benefit of malefactors, or else their crimes are to go untried and unpunished.

I do not see why it might not, with equal sense and reason, be pretended that a change in the person of the judge, by the death of one, and the appointment of another, is to take away the jurisdiction of the court over offences committed before such change of person, as well as in the case of a change of the tribunal.

The argument conflicts, also, with the universally acknowledged principle of public law, that the sovereign of a conquered or ceded country or territory may displace the officers of the former government, and substitute his own judicial system; as also with the rights of the society in which a new government is introduced by revolutionary action on the part of the inhabitants of the country; for if the argument be sound, it draws after it the conclusion that, in the cases designated, the change of government, whether by cession, conquest, or domestic revolution, obliterates the past, wipes out all crimes as with a sponge, throws everything into chaos, and compels government to begin *de novo*, and to legislate solely for future transactions, as if it had but just emerged from a state of nature.

There is not the slightest reason to say that the establishment of a new tribunal, with jurisdiction to take cognisance of

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crime committed against existing laws, whether perpetrated before or after the organization of such new tribunal, is touched by the inhibition of *ex post facto* laws in the Constitution. That inhibition is, in terms, applied to a bill of attainder or *ex post facto* law, (Art. 1, s. 9,) which is well understood to be meant only of *penal* statutes. An *ex post facto* law is a penal statute, which, by retrospect, renders an act punishable, which was not so previously, or not in the same way: as by a law which makes an act, done before the law passed, criminal, and liable to punishment, although innocent, legally, when done; or a law, which aggravates a crime, and makes it greater than when it was committed; or which inflicts greater punishment than was annexed to it when it was committed; or which alters the rules of evidence, and receives less or different testimony than was required at the time of the commission of the offence. (*Calder et ux. v. Bull et ux.* iii Dall. 386; *Fletcher v. Peck*, vi Cranch, 87; *Ogden v. Saunders*, xii Wheaton, 213; *Ross' Case*, ii Pick. 165.)

Laws, which only reorganize and change the judicial tribunals, although the new establishment be invested with cognisance of crimes before such reorganization, have never been classed with *ex post facto* laws, nor do they come within the scope of any definition of *ex post facto* laws. The point has been expressly decided in the State of Massachusetts, namely, that a statute creating a new court, or enlarging or diminishing the powers of an existing court, is not an *ex post facto* law. (*Wales v. Belcher*, iii Pick., 508; *Commonwealth v. Phillips*, xi Pick., 28.)

Nor can it be pretended that a law, changing the court or jurisdiction, is obnoxious to objection for harshness or injustice, or other repugnance to establish principles of penal jurisprudence. Indeed, the change of jurisdiction, made in the present case, instead of being a hardship to criminals, did, on the contrary, mollify their condition, by giving them a court and a jury of the vicinage in California itself, instead of sending them to Louisiana or to Oregon.

The Government of the United States has undoubted right to alter, modify, and reorganize the system of courts inferior to the Supreme Court, from time to time, and to regulate their

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powers and jurisdiction as to past as well as to future cases, civil and criminal.

No government is morally obliged to continue in existence a defective or inconvenient system of judicial tribunals, or to abstain from re-organizing and improving them, and adapting them to its population, or to other exigencies of its social condition.

I am not aware of any adjudication of the courts of the United States in which the precise question has been mooted. Yet the opportunity of doing it has existed continually, as may be inferred from the frequent changes of jurisdiction produced by the growth of the United States in territory and population. Congress has acted in the sense of the rightfulness of such legislation from the very foundation of the Government. Courts have accepted it as constitutional and just. And at no time, apparently, has the propriety and lawfulness of such legislation been called in question, though opportunity was offered by the vast number of crimes, which have been punished by courts, which either did not exist when the crimes were committed, or had undergone changes of organization or jurisdiction. Such legislation, it has been apparently felt and admitted, is called for by the public good, does not in any relation affect injuriously the alleged criminal, is just in itself, and consonant with all the general principles of good law, and altogether conformable to the Constitution.

But, in one of the States at least, Massachusetts, the very point is alluded to as one too clear for controversy. "That the legislature have full power to change the criminal jurisdiction, and transfer the same from one court to another, is not denied," says Mr. Justice Dewey, delivering the opinion of the court in the case of *Brien v. The Commonwealth*, (v *Metcalf*, 508,) in which case the proposition would have been denied if such denial had been tenable for a moment.

In the case of the *Commonwealth v. Phillips*, also, the same court in fact dealt with this very objection, coming up as an argument of alleged *ex post facto* legislation. It was a case of additional punishment inflicted by a new court; the additional punishment being, of course, provided for by existing laws. The general objection as to the transfer of criminal jurisdiction was

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taken *per se*, and summarily disposed of by the court with the remark:—"We do not perceive why it is not competent to the legislature to vest this jurisdiction in one court as well as another. But the *ex post facto* argument involved the whole question and was considered *in extenso* by the court, which concluded, unequivocally, that a change of the former might be made without any violation of laws." (Com'th. v. Phillips, xi Pick. 27, 31, 32.)

In Pennsylvania the same point has been adjudged by implication; because the Supreme Court of that State,—after deciding that an act, creating a special Court of Oyer and Terminer for the trial of a felony previously committed, was irregular because of its exceptional specialty to a single case, and for other reasons not material to the present issue,—did accept as constitutional and valid a new act designating one of the judges of the Supreme Court to hold a special Court of Oyer and Terminer; thus sanctioning the trial of the party by a tribunal organized after the commission of the crime. (Com'th. v. Flanagan, vii Watts & S. 68, 70.)

A late commentator on constitutional law, in view of all the relations of the subject, lays it down as decided, that the legislature has the right to mould the jurisdiction of all courts at will, provided it does not invade the sanctuary of any other constitutional provision; that it may enlarge or diminish the functions and authority of courts and magistrates; and that the power to do this, if not expressly given, would result from the very nature of legislative powers. (Smith's Com. 374.)

A careful review of the whole matter leads to the following conclusions, namely:

1. The judge of the Court of Common Pleas of Ohio, before whom the writ is made returnable, ought not to go behind the return, showing, as it does, arrest of the party in due form to answer to an indictment found in the District Court of the United States for the Northern District of California.

2. If, however, the judge should think otherwise, and see fit to go into the matter of the return, it seems to me that he must, of necessity, stop at the question of jurisdiction. If the District Court of California has jurisdiction in the case, then the Court of Common Pleas of Ohio has not.

3. On examining the question of jurisdiction he cannot fail

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to see the fallacy of all the objections to the jurisdiction of the District Court of California, and will therefore remand Collier to the custody of the Marshal of the State of Ohio.

I am, very respectfully, your obedient servant,

(Signed,)

C. CUSHING.

Hon. JAMES GUTHRIE,

Secretary of the Treasury.

COURT MARTIAL—PARDON.

A general, commanding the forces of the United States in the field, does not possess power to commute the sentence of cashiering, pronounced by a court-martial, but only the power to execute the sentence, or to suspend it and take the direction of the President.

The appointment of an officer of the marine corps to a new commission is constructive pardon of a previous sentence pronounced but not yet executed.

ATTORNEY GENERAL'S OFFICE,

September 20, 1853.

SIR: The case of John S. Devlin, late a lieutenant in the marine corps, referred to this office in 1850, and accidentally passed over, it would seem, has been called up for consideration by your letter of the 20th of July.

From the report of the Fourth Auditor it appears, that Mr. Devlin, being a lieutenant of marines on service with the Army in Mexico, was sentenced to be cashiered by a court-martial held there; that the general-in-chief, after approving of the sentence, directed that the sentence should be commuted to twelve months' suspension from rank, command, and emoluments; that the proceedings of the court-martial and the order of the general-in-chief thereon have not been submitted to, or acted on, by the President of the United States; that Mr. Devlin continued in the service, in effect, under suspension, until he, with other officers, was displaced by the President, not upon the above-mentioned sentence of court, but in virtue of the act of Congress of the 2d of March, 1847, and in restoring the peace establishment of the marine corps, (ix Stat. at Large, 155;) and that he was afterwards re-appointed by the President, with advice and consent of the Senate, under the power conferred by the act of March 3d, 1849 (ix Stat. at Large, 377.)

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Upon these facts the Auditor submits inquiry as to the legality of the order of the general-in-chief, commuting the punishment of Mr. Devlin.

By the 65th article of the rules and regulations for the government of the Army, (Military Laws, p. 117,) it is declared that;

“Any general officer commanding an army, or colonel commanding a separate department, may appoint general courts-martial whenever necessary. But no sentence of a court-martial shall be carried into execution until after the whole proceedings shall have been laid before the officer ordering the same, or the officers commanding the troops for the time being; neither shall any sentence of any general court-martial, in time of peace, extending to the loss of life, or the dismissal of a commissioned officer or which shall, either in time of peace or war, respect a general officer, be carried into execution, until after the whole proceedings shall have been transmitted to the Secretary of War, to be laid before the President of the United States for his confirmation or disapproval and orders in the case. All other sentences may be confirmed and executed by the officer ordering the court to assemble, or the commanding officer for the time being, as the case may be.”

And, by the 89th article, it is declared, p. 120, that:

“Every officer, authorized to order a general court-martial, shall have power to pardon or mitigate any punishment, ordered by such court, except the sentence of death, or of cashiering an officer, which, in the cases where he has authority (by article 65) to carry them into execution, he may suspend until the pleasure of the President of the United States can be known; which suspension, together with copies of the proceedings of the court-martial, the said officer shall immediately transmit to the President for his determination.”

By the 65th article, the general-in-chief had the full power to confirm the sentence of cashiering against Lieutenant Devlin. The power is plenary, the only exception being that no sentence shall be carried into execution *in time of peace*, extending to the dismissal of a commissioned officer, until after the proceedings have been laid before the President for his confirmation or disapproval, and orders in the case.

But the commander-in-chief had no power whatever to pardon

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or mitigate the sentence against Devlin, the 89th article expressly excepting the cashiering of an officer from his power to pardon or mitigate. All the authority he had was to suspend the carrying of the sentence into execution until the pleasure of the President could be known.

I think it cannot be said here that the state of war conferred the power of commutation in this case; for it is only the state of war which would, by the 65th article, have given to the commander-in-chief the power to execute the sentence of cashiering; and the language of the 68th article is express, that, in the cases where the general-in-chief has authority to carry into execution such a sentence, to wit, in time of war, he shall not pardon or mitigate, but may suspend execution and make report to the President.

I do not think it would be a fair construction of the approval of the sentence by the general-in-chief, to take it by itself, without the subsequent portion commuting it to suspension from rank, command, or emoluments for twelve months. Lieutenant Devlin was not, in fact, cashiered.

It seems to me, therefore,—without going into the question of what is mitigation and what substituted punishment, (see Mr. Taney's opinion, October 12, 1848, and Mr. Mason's opinion of October 16th, 1845,)—and assuming that what the general-in-chief here intended was mitigation,—yet that it was done without authority, and, at any rate, unless approved by the President, is a nullity.

The Fourth Auditor, assuming that the general-in-chief had, of himself, no authority to commute the sentence of Mr. Devlin, further suggests whether the order of the general-in-chief may not be treated as a suspension of the sentence, and the same be now considered and disposed of by the President.

There is one fact in the case, which disposes of this inquiry, without looking into other legal relations of it; namely, the reappointment of Mr. Devlin under the subsequent act of Congress. If the proceedings against Mr. Devlin are to be deemed as pending at this time,—and, unless they were so deemed, they could not be approved or disapproved by the President—then the appointment of Mr. Devlin is a constructive pardon, according to the decision in the case of Lieutenant Hooe. (Mr. Legare's

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opinion, 18th March, 1842. See ii Rolle's Rep. 50, Sir W. Raleigh's Case.)

So that, in either point of view, I feel constrained to come to the conclusion that neither the sentence of cashiering, nor the order of commutation, took effect against Mr. Devlin.

I am, very respectfully, yours, &c.,

(Signed,)

C. CUSHING.

Hon. JAMES C. DOBBIN,

Secretary of the Navy.

 RELIEF OF SEAMEN.

Expenditures for the ransom of the crew and passengers of a wrecked American vessel, held prisoners by the Indians of Queen Charlotte's Island, do not come within the scope of the appropriations for the relief of American seamen, administered by the Secretary of State.

ATTORNEY GENERAL'S OFFICE,

September 22, 1853.

SIR: By the letters, invoice of purchases, bill of exchange, and protest, accompanying your letter of the 20th inst., it appears that in December, 1851, Simpson P. Moses, Collector of the District of Puget's Sound, chartered the schooner Damariscon, for an expedition to Queen Charlotte's Island, with intent to obtain the release of the crew and passengers of the American Sloop "Georgiana," wrecked on the east side of Queen Charlotte's Island, then prisoners held in captivity by the Indians on that island, within the dominion of the Government of Great Britain.

In the same month, Captain B. H. Hill, of the Army of the United States, acting as commandant of a post in Oregon, instructed J. Dement, first lieutenant of artillery, to proceed on board of the Damariscon, with a non-commissioned officer, five soldiers, and ten citizens, who had volunteered their services to the collector, for the guard and protection of the schooner in this expedition against the Indians.

The collector, Moses, by letter of the 16th December, 1851, instructed Lieutenant Dement to make, at Port Victoria, on

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Vancouver's Island, a purchase of such blankets, and other goods, as in the joint discretion of himself and L. Balch, master of the schooner Damariscon, might be deemed necessary for attaining the objects of the expedition.

On the 24th of December, 1851, upon this letter of the collector, goods to the amount of \$1838.91 were purchased of the Hudson's Bay Company, at Vancouver's Island, as certified by Lieutenant Dement and L. Balch; and Lieutenant Dement drew therefor on Simpson P. Moses, the collector, at four days' sight; which bill was accepted by Moses, on the 9th January, 1851, but was protested, on the 16th August, 1852, for non-payment; the collector alleging want of public funds, and want of instructions from the Government of the United States, as causes for non-payment.

In May, 1853, payment of this protested bill was asked of the War Department; but refused by Secretary Davis, because it was drawn without authority, and for a purpose not connected with the military service.

Afterwards, on the 9th of May, 1853, payment of this bill was asked of the Secretary of the Treasury, and refused by Secretary Guthrie, as it had been before refused by Secretary Corwin, because it was drawn without authority, and for a purpose not connected with official duty.

Payment of this bill being asked at the Department of State, the Secretary inquires, "Can this demand be paid under an appropriation 'for the relief and protection of American seamen in foreign countries?'"

I think not. The vessel was chartered, and the armed expedition fitted out, without authority of law. However good the motives of the collector and of Captain Hill in the matter, and they appear to have been altogether commendable, yet, in assuming cognisance of subjects not within their jurisdiction, their acts are not obligatory on their Government.

If the persons in captivity had all been American "seamen," yet the measure and manner of relief and protection were subjects to be considered, determined, and directed by the lawfully constituted authorities of the United States in regard to the administration of the fund appropriated 'for the relief and protection of American seamen in foreign countries,' not by

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any person or persons, who, from motives of philanthropy, should voluntarily take upon themselves the relief of persons wrecked or held in captivity in a foreign country.

If the President of the United States should think proper, through the Department of State, to adopt in any case the acts of those, who had spontaneously afforded such relief, still such after adoption of a prior spontaneous act would have to be restricted in the expenditure of this fund to the cases of "American seamen" alone, and could not be extended to the relief and protection of persons, who, being passengers only, and not seamen, happened to be in a shipwrecked American vessel, and captives afterwards in company with seamen.

As no money can be lawfully drawn from the Treasury but in consequence of appropriations made by law, and as the expenditures, in this case, have already been decided by the Secretaries of War and of the Treasury not to be chargeable on any appropriation in their departments, and are not, in my judgment, chargeable on any appropriation in the State Department, the case requires the intervention of Congress, which, in consideration of the meritorious character of the expenditures, will, it is presumable, provide therefor.

I advise, therefore, that the subject be favorably presented to the consideration of Congress.

I am, very respectfully,

C. CUSHING.

Hon. WM. L. MARCY,
Secretary of State.

PURPRESTURE.

The erection, by third parties, of any structure encroaching on a public pier constructed by the United States for the improvement of a harbor, is an act of purpresture.

ATTORNEY GENERAL'S OFFICE,
September 22, 1853.

SIR: The letter of Captain Stansbury, of the Corps of Engineers, referred to me by you on the 25th of July, sets forth

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an encroachment made, or intended, upon a pier constructed by the United States for the protection or improvement of the harbor of Cleaveland, in the State of Ohio.

The act complained of is the commencement of a structure encroaching on this public pier in the river and harbor at Cleaveland.

Such an act of purpresture, that is, unlawful appropriation of, or encroachment on, a public right of this sort, whether pier, port, navigable water, or the like, being the usurpation of public franchises or property by private persons, is in general subject to various legal remedies; that is to say, the purpresture contemplated or commenced may be prevented and arrested, or if completed it may be removed and abated, in appropriate forms of law.

I propose, in reply to your communication of the 21st inst., regarding the public works at Waukegan, in the State of Illinois, to present in detail my views of the proper remedies in such case, and of the general matter, which involves questions of permanent interest in the business of the Government.

Meantime it is not convenient for me to instruct the District Attorney directly as such, at least in this stage of the question. I have, in substantial compliance with your wishes in that respect, conferred with the Chief of the Topographical Bureau already as to the condition and progress of the affair, and shall with pleasure continue, as occasion may require, to afford all the aid in my power to the conservation of the rights herein appertaining to the United States.

I am, very respectfully, your obedient servant,

C. CUSHING.

Hon. JEFFERSON DAVIS,
Secretary of War.

Texas Bonds.

TEXAS BONDS.

On the act of Congress, which directed the delivery, by the United States, of ten millions of dollars in stock to the State of Texas, provided that no more than five millions of said stock be issued until certain creditors of the State should have filed in the Treasury releases of all claims against the United States: Held, that the Secretary of the Treasury cannot make delivery of the reserved five millions by apportionment, but must withhold all payments until evidence be presented to him of the complete discharge of the United States in the premises.

The legislative and executive acts of the Republic of Texas analyzed, in order to determine the different obligations of the State, which have thus been assumed by the United States.

ATTORNEY GENERAL'S OFFICE,
September 26, 1853.

SIR: The questions, relating to the construction of the compact between the United States and the State of Texas, on the subject of the payments to be made to the latter by the former of two sums of five millions of stock each, in consideration of an agreed change in the boundary of the said State, presented by your letter of the 7th of April last, have been held under advisement until the present time, partly in compliance with the wish of diverse parties in interest desirous to be heard thereon, and partly for other considerations.

The subject-matter is a grave one, as affecting the rights of one of the States of the Union, and involving the good faith of the United States in the execution of a solemn compact with that State.

The measure of my responsibility is sensibly increased by the fact that the late Secretary of the Treasury (Mr. Corwin) expressed opinions on the subject, which were adopted by the late President of the United States, (Mr. Fillmore,) and that it becomes my duty to review those opinions: in which circumstances it is some relief to find that, although their conclusions were in accordance with those of a gentleman of the highest professional eminence and authority, (Mr. Reverdy Johnson,) yet they have not the additional weight of an official opinion from the Attorney General for the time being, (Mr. Crittenden.)

It is, indeed, objected, in one of the arguments submitted to me, that the decision of the late Executive is to be held as final

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in the case. I do not so understand it, however. The distinction between thoughts and acts, between things executory and things executed, is obvious. A matter executed by one administration cannot be undone by a succeeding administration. But an opinion expressed upon a matter executory may be reviewed, and reversed or modified, at any time before execution. The late Executive, in answer to the inquiry of certain creditors, expressed an opinion, merely: it conferred no vested right; it had no conclusive binding force. As the former Administration, in the opinion expressed by it, respecting the meaning of the compact, had time for consideration, a *locus pœnitentiæ*, so also the present Administration has the right to review this unexecuted opinion, and the power, and the duty, to deliberate on the proper course to pursue, until the reserved five millions of stock, as hereafter described, shall be actually delivered to the constituted authorities of the State of Texas.

By an act proposing to the State of Texas an alteration of her boundary, upon the terms therein mentioned, approved 9th September, 1850, (ix Stat. at Large, pp. 446, 447, chap. 49,) and the proclamation of December 13th, 1850, announcing that the State of Texas had accepted and ratified those terms, (ibid. Appendix, No. 10,) the United States, in consideration of the cession to them, by Texas, of the territory, and of the relinquishments made by Texas, as mentioned in articles first, second, and third, stipulated by article fourth, to pay to the State of Texas "the sum of ten millions of dollars, in a stock bearing five per cent. interest, and redeemable at the end of fourteen years, the interest payable half-yearly at the treasury of the United States.

"Fifth. Immediately after the President of the United States shall have been furnished with an authentic copy of the act of the General Assembly of Texas, accepting these propositions, he shall cause the stock to be issued in favor of the State of Texas, as provided in the fourth article of this agreement.

"Provided, also, That no more than five millions of said stock shall be issued until the creditors of the State, holding bonds and other certificates of stock of Texas, for which duties on imports were specially pledged, shall first file at the Treasury of the United States releases of all claim against the United

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States, for or on account of said bonds or certificates, in such form as shall be prescribed by the Secretary of the Treasury, and approved by the President of the United States."

Upon this act of Congress two principal questions arise, namely: First, What are, in fact, the obligations of the State of Texas, for which releases must be filed in the Treasury of the United States before the delivery to Texas of the second parcel of five millions of stock; and, secondly, whether the stock must be delivered altogether after the execution of all the releases required, and not before, or whether it may be issued in parts on the filing of particular releases?

Before attempting to answer these principal questions, it will be convenient to analyze the several pertinent acts of the State of Texas, both legislative and executive.

The public debt of Texas, as existing at the passage of the act of Congress of 9th September, 1850, and the acceptance of the terms thereof by the State of Texas, by act of her legislature, approved 25th November of the same year, arose out of the following acts of the legislature of the State, viz.:

1. "An act to authorize the President to negotiate a loan, on the bonds of the Government, not exceeding five millions of dollars." Approved 18th November, 1836.

By section 10th, for the punctual payment of interest, not exceeding ten per cent. per year, and final redemption of the principal, the public faith "is solemnly pledged, and also all proceeds of the sales of the public domain, and also all taxes on lands which may accrue to this government after the year 1838, are hereby reserved and appropriated."

In this act "duties on imports" are not "specially pledged." The Republic of Texas had not then imposed duties on imports.

2. "An act to authorize the consolidation and funding of the public debt." Approved 7th June, 1837.

This act authorized the public creditors of the Republic of Texas to fund their demands, by taking certificates of stock bearing interest at the rate of ten per centum per annum, payable semi-annually; the stock to be divided into shares of one hundred dollars each, redeemable at the discretion of the Government, after the first day of September, 1842, to the amount

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of three millions of dollars, or so much thereof as necessary to satisfy the liabilities of the republic.

"Sec. 3. The public faith is hereby pledged for the redemption of said stock, agreeably to the foregoing provisions; and so much of the public revenue arising from impost and direct taxation, as may be necessary to meet the annual interest of the funded debt, is hereby appropriated and set apart for that special purpose.

"Sec. 7. All just demands against the Government to be received at par for stock certificates, provided the same shall amount to even shares;" if not, the creditor may make up the deficiency in cash, having a discount on the stock at the rate of ten per cent.

By this act the "duties on imports" were specially pledged.

3. The next was an act authorizing the issuing of promissory notes of the Government, approved 9th June, 1837.

This act authorized the issue of notes payable at the treasury, of not less than one dollar each, nor greater than one thousand dollars each.

"Sec. 3. Said notes, at any time before or after maturity, shall be considered as cash, and shall be received for all dues owing or coming to the government."

Sec. 6 authorized the President of the Republic to sell five hundred thousand acres of land scrip, at not less than fifty cents per acre, 'the proceeds of which shall be placed in the public treasury, to be paid out only for redemption of these promissory notes.'

"Sec. 7. All improved forfeited lands are hereby pledged for the redemption of these promissory notes of the Government, and in addition, the faith and credit of the Government are hereby solemnly pledged." And a subsequent act of May 18, 1838, authorized the reissue of these notes from time to time as they might be returned to the treasury, so that they operated as a circulating currency of paper money.

The express pledges in the act of June 9, 1837, are not of duties on imports, but only the proceeds of certain land scrip, and all improved forfeited lands.

4. The next was an act to authorize the President to negotiate a loan on the bonds of the government, not exceeding five

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millions of dollars, approved the 16th of May, 1838. The interest not to exceed ten per cent. per year.

This act made these bonds receivable for the purchase of the public lands at the minimum price, and any holder might pay with them his bids for the lands sold at public auction.

Sec. 2 authorized the fund-commissioner of the Republic "to stipulate that the notes of any bank or banks, purchasing such bonds to the amount of one hundred thousand dollars, or more, shall be receivable in payment of all public dues, so long as the said bank or banks shall be, in the judgment of Texas, of good character and worthy of confidence."

"Sec. 7. For the punctual payment of the interest and final redemption of said bonds, the public faith is hereby solemnly pledged."

In this act "duties on imports" were not "*specially* pledged."

Subsequently, however, by the fourth section of an act passed January 22, 1839, it was enacted "that, in case the said five million dollars, or any part thereof, should be negotiated by virtue of the aforesaid act of 16th May, 1838, in addition to the general pledge of the faith and credit of the Republic, contained in said act, for the payment of the interest and redemption of the principal of said loan, so much of the revenues of the Republic as may be necessary shall be set apart and semi-annually remitted to the Bank of the United States, in Philadelphia, to meet the semi-annual interest on said bond or bonds issued under said loan."

Here is a specific pledge of so much of the revenues of the Republic as may be necessary for the payment of principal and interest of the loan of May 16th, 1838,—that is, of all the revenues, including duties on imports.

It has been suggested that the pledge of *all the revenues* does not come up to the condition of the act of Congress, "for which duties on imports were specially pledged." I feel constrained, however, to agree fully with the reasoning of Mr. Corwin as to this point. *Omne majus in se minus continet*—the whole includes all the parts.

If a pledge of all revenues be not a pledge of duties on imports, then it is no pledge of anything; for you may strike out from its purview each and every *species* comprehended in the

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genus "revenue," by force of the same reasoning which strikes out duties on imports; and the effect would be to annul, and altogether defeat, the whole purpose of the law-giver.

A joint resolution, approved 19th January, 1839, only prolonged the time for keeping open the books under a former act for subscribing to the loan, or funding the debts, and allowed the holders of the promissory notes to fund them, and take in lieu certificates of stock.

5. The next was "An act to authorize the President to negotiate a loan of one million of dollars," approved 22d of January, 1839.

By section 3, the commissioner had power to stipulate "that the notes of any bank or banks, purchasing such bonds, shall be received in payment of all public dues, so long as said banks should be in good credit, and redeem their notes in gold and silver when presented."

"Sec. 5. For the punctual payment of the interest, and final redemption of said bonds, the public faith is hereby solemnly pledged, and so much of the receipts from the *customs*, and the proceeds of the *sale of the public lands*, as may be necessary to carry into effect this pledge."

In this act there are two special *pledges*,—the proceeds of the *customs*, and the proceeds of the sales of the public lands. The proceeds of the direct tax are not *pecially* pledged.

6. But the most important of all these acts is that of January 14, 1840, being an act to provide for the more certain operation of the sinking fund, and to extinguish the five-million loan, "and such further loans as the Republic may cause to be negotiated, and for other purposes."

This act, it will be seen, is prospective as well as retroactive, in its objects, and it applies to future as well as to past loans.

Sections 1st, 2d, 3d, 4th, 5th, 6th, 7th, 9th, and 14th, relate to the sinking fund and the execution of the previous laws authorizing the negotiations of loans.

Sections 10th, 11th, 12th, 13th, and 16th, relate expressly to *future* loans.

Section 15th is in the following words: "That for the redemption of all loans negotiated by the authority of the Republic of Texas, independently of the reservation of the sinking fund,

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the proceeds of the sales of the public lands, its revenues, and public faith, are solemnly pledged."

The full import of this provision of the law will be remarked upon presently.

7. An act without date in the statute-book of Texas, but at the close of the acts of the fourth Congress, and spoken of in some of the documents before me as of the 5th of February, 1840, provides for the funding of certain liabilities of the republic, under the superintendence of the fund-commissioner created by previous acts, and for the issue of certificates of stock thereon, some at ten, and some at eight per cent. according to the class of the debt funded.

The evidences of debt issued under this act are, by express name, certificates of stock, and the transaction is a negotiation of loan, being, by the terms of the act, an addition to the "funded debt of Texas."

This act makes no mention of any source of revenue, from which the new certificates are to be paid; it contains no special pledge of any property or income; it does not even pledge the faith of Texas. Evidently, the legislative body assumed that some existing provision of law applied to this class of certificates as part of the funded debt of Texas, under the general jurisdiction of the commissioner. We shall see presently how existing legislation bore upon this act.

8. An act passed the 5th of February, 1840, to create funds for the support of the Government. It provides for the issue of 8 per cent. bonds in the name of the State Commissioner, and the transaction is undoubtedly the negotiation of a loan.

According to the 3d section, these bonds "Shall be at all times receivable by any collector of revenue, or at the Treasury Department, in payment of any debt to the Government, or any duties by import, or direct taxation, for the amount value of such funds, and the interest which may have accrued thereon."

It is contended in some of the arguments before me, and assumed by the late Secretary of the Treasury, that the receivability of the bonds under this act in payment of any "duties by import," constitutes a special pledge of duties on imports within the meaning of the phrase in the act of Congress. I do not think this altogether certain; for, although the United

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States, by receiving the Republic of Texas into the Union, extinguishes all the separate import duties, and collects them into the federal treasury, and may therefore be under obligation to see that all such debts of Texas as were made receivable for duties on imports are provided for, it would not therefore follow of necessity that all such debts have been in fact provided for by the act of Congress under consideration.

However, without enlarging on the nature of the difference between a pledge of a given source of revenue, *eo nomine*, and engagement for receivability in that revenue, it suffices here to say that, in my opinion, the provision of the act of January 14th, 1840, applies to the several loans of February 5, 1840. The words are: "That, for the redemption of *all* loans negotiated by the authority of the Republic of Texas, independently of the reservation of the sinking fund, the proceeds of the sales of the public lands, its revenues, and public faith, are solemnly pledged." It does not say "for the redemption of all loans *heretofore* negotiated," but "*all* loans negotiated"—that is, whether heretofore or hereafter. It is, on the face of it, and by the legal import of the words, an act of general or permanent legislation; and the obvious motive and object of Texas required this. What sense could there be in providing additional security for loans already negotiated, nay, reiterating the security given by previous acts, and leaving without any security a loan to be negotiated like the stocks of February 5th, 1840? For, be it observed, that the loan, contrary to the condition of every other loan proposed by the Republic, stands without apparent security. I think the explanation of which is plain, to wit: that the loans of February 5th were understood to be covered by the provision enacted three weeks before, on the 14th of January. That act of January 14th is an act permanent in its nature, which by its title, and by the tenor of its different sections, provides for both past and future loans; the 15th stands between two sections, the 14th and 16th, the former of which deals expressly with loans both past and future, and the latter exclusively with loans yet to be negotiated. By its own terms, by the terms of the act of which it is a part, and by the immediate context, it is a standing enactment to protect all

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loans which had been or which might be negotiated for the republic.

Now, the provision of the act of January 14th, 1840, pledges the revenues generally for the security of any loans negotiated by the Republic,—that is to say, all revenues, including duties on imports. I repeat here the remark made before as to the effect of the term “revenues” generally,—that it must, in my judgment, be taken as comprehending duties on imports, the whole including all its parts, and as being the special pledge of the act of Congress.

These are all the laws of Texas, which authorized the negotiation of loans, the issue of certificates of stock, or bonds, or promissory notes, so far as is necessary for the understanding of the subject, on which the opinion of the Attorney General is now requested.

By other laws of Texas the auditor and comptroller have been required to audit all the demands against the State, to scale them according to the depreciation in the value of the funds, received by the State, as the consideration of stocks, bonds, treasury notes, and other evidences of debt issued by the executive officers of the Government.

In obedience to those laws, the auditor and comptroller made report, bearing date 27th December, 1849, to the Legislature of Texas, showing the ostensible amount of debts, the rate of depreciation, and the par value. That report enumerates the debts under three classes:

The first class comprises the audited and ascertained claims under the acts of November 18th, 1836, June 7th, 1837, June 9th, 1837, May 16th, 1838, January 22d, 1839, and the act of February 5th, 1840, amounting in all to the sum of \$6,725,933.37, reduced, by the rates of depreciation applied, to \$4,021,035.96.

Class second consists of claims “sufficiently authenticated to admit them to audit under the laws of the late Republic”—\$313,407.77, reduced by scale of depreciation to \$285,734.27.

Class third, “consisting of claims not sufficiently authenticated to authorize their being audited under the laws of the late Republic”—\$144,136.20.

The sum total of the three classes, as above, is \$7,213,477.43, of ostensible debt, but scaled to \$3,450,907.52.

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To this sum, however, outstanding claims, not filed with the auditor, are to be added, swelling the aggregate of ostensible debts to \$11,055,694.71—reduced to par value, \$5,600,696.01.

Such is the official report of the auditor and comptroller communicated to the legislature on the 1st of January, 1850, by Governor Bell.

This statement includes bonds, certificates of stock, arrearages due to the army and navy, and all other certificates of outstanding claims against the Republic of Texas, which had been presented or were then known to the Treasury Department of the State.

In the report made by Mr. Corwin, Secretary of the Treasury of the United States, to the President of the United States, of September 13th, 1851, the whole debt of the State of Texas of all classes, is stated at \$14,435,982.68—reduced, by the scale of depreciation applied by the State, to the sum of \$6,847,322.23, as shown in detail by the synopsis accompanying that report.

Having the facts thus before us, we may now recur to the two principal inquiries propounded by you.

First: what are the obligations of Texas which are to be released to the United States?

The words of the condition as to the stock withheld are, “until the creditors of the state holding bonds, and other certificates of stock of Texas, for which duties on imports were specially pledged.”

The claims to be released then, are—

1. Bonds, or certificates of stock: not all evidences of indebtedness, but bonds or certificates of stock. This excludes not only arrearages, if any due, for supplies or services, or any other unliquidated debt, but also the circulating notes of the 9th June, 1837.

Bonds and certificates of stock are specially known and expressed in the laws of Texas giving authority for their issue, and are clearly distinguished from these treasury notes, commonly called red-backs, of the denomination of one dollar, and so on, not exceeding one thousand dollars each, issued and re-issued by the Government, and from all other evidences of indebtedness.

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These distinctions are also contained in the official report of the auditor and comptroller of the State of Texas, which was communicated by Gov. Bell to the legislature of Texas in January, 1850, and was before Congress when it passed the act under consideration.

Indeed, the treasury notes in question, instead of being themselves certificates of stock, were convertible into certificates of stock, and therefore must have been things of a different character. And the word "bond" has an established legal meaning, which it is impossible to confound with "promissory notes."

I should have been glad to come to a different conclusion, as to this class of securities, if I could, because it was the probable purpose of Congress in this act to guard the United States against any possible claim on account of the debts of Texas; but I cannot. The phraseology of the act is too specific to admit of such a construction as to include promissory notes. In the resolution offered by Mr. Clay, which led to the act, the phraseology employed was: "That it be proposed to the State of Texas that the United States will provide for the payment of all that portion of the legitimate and *bona fide* public debt of that State, contracted prior to its annexation to the United States, and for which the duties on foreign imports were pledged by the said State to its creditors." Why, when the act came to be introduced and passed, the comprehensive but accurate language of the resolution was changed to the equally accurate but less comprehensive designation of two classes only of "the legitimate and *bona fide* public debt of Texas," I do not know: suffice it for me, that the change was made so as to limit very much the scope of the releases required by the United States.

2. The bonds and certificates of stock to be released are such for which duties on imports were specially pledged, a pledge of all revenues being, in my judgment, a pledge of revenues from customs.

Therefore, the scope of the condition covers not only the bonds and certificates for which these revenues are pledged by express act applicable to the particular class of bonds or stocks, but all loans negotiated by the Republic of Texas.

But the circulating promissory notes of the treasury, the red-backs, do not, in my opinion, come within the true meaning of

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the phrase "loans negotiated by the Republic." "Loans negotiated" by a government, whether in the technical language of dealers in money, in the popular sense, or in the legal sense, have a definite and precise meaning, which is violated and transcended by undertaking to extend the expression to comprise the issues of paper money, circulating treasury notes, and every evidence of indebtedness existing against the Republic of Texas.

I feel constrained, therefore, with all proper deference for the judgment of Mr. Corwin, to differ with him as to results, in so far as he assumes that "all the public debt of Texas" created prior to a certain date, and "all the debts of said Republic made receivable for all public dues," are comprehended within the language of the act of Congress, and must be released before the delivery of the reserved five millions to Texas.

The indebtedness to be released must be of bonds or certificates of stock. I include, therefore—

1. The issues under the act of June 7th, 1837, estimated, as outstanding on the 1st of July, 1850, principal and interest—\$1,651,590.
2. Outstanding issues, as above, under the acts of November 18th, 1836, May 15th, 1838, January 22d, 1839, and January 14th, 1840—\$2,582,902.
3. Outstanding issues of certificates of stock of ten per cent. consolidated fund, by the act of February 5th, 1840—\$1,628,936.
4. Outstanding issues of eight per cent. bonds, under the act of February 5th, 1840—\$1,472,908.

These particular sums amount, in all, to \$7,336,336, on the first of July, 1850, to which is to be added the interest which may have since accrued; the said amount having, however, been reduced to \$3,798,795, according to the scale adopted by the State of Texas.

I exclude all the indebtedness of Texas described in the report of the auditor as "audited drafts," and also the new issues under the act of March 20th, 1848, the nature of which does not appear, but which seems to be recognised by all parties as not being of bonds or certificates of stock within the purview of the act of Congress.

I feel constrained, also, as already intimated, to exclude the promissory notes, mostly without interest, issued under the act

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of June 9th, 1837, in all the form and similitude of a common bank bill. I am unable to regard this paper as either bonds or certificates of stock.

It is of no avail to say that these promissory notes are on the face of them, and by law, made receivable for "all government dues," and so are a lien upon customs duties. The answer is, that the act of Congress requires two conditions, one of which is security by pledge of duties on imports; but the other is, that the thing secured shall be a bond or certificate of stock.

Nor does it avail to say that these promissory notes, being receivable for government dues in the Republic of Texas, ought to be redeemed by the United States, who have absorbed a portion of the revenues of Texas, to wit, duties on imported merchandise. It suffices that, whatever may or may not be the obligation of the United States in the premises, these notes are not in fact provided for by this act of Congress.

According to the terms agreed between the United States and the Republic of Texas, whereby that Republic became one of the United States of America, the vacant and unappropriated lands within its limits were to be retained by her, and "applied to the payment of the debts and liabilities of said Republic of Texas; and the residue of said lands, after discharging said debts and liabilities, to be disposed of as said State may direct; but in no event are said debts and liabilities to become a charge upon the government of the United States." (Joint resolutions of March 1st, 1848, v Stat. at Large, 798.) The citizens of Texas were bound by that political act of their government. The provision made for certain of the debts of Texas, by the act modifying her boundary, is in fact the execution, so far forth, of the condition in the compact of the entry of Texas into the Union. The United States, in taking from Texas, by the act of 1850, a cession of a large quantity of her "vacant and unappropriated lands," and in paying her therefor, chose to stipulate that a portion of the purchase-money should be "applied to the payment of the debts and liabilities of said Republic of Texas." It by no means follows that the United States have assumed any liability thereby, or impliedly recognised the existence of any liability on their part; nor that any less of readiness will be shown by the proud and wealthy State

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of Texas to fulfil the engagement in regard to her debts contained in the compact of her admission into the Union.

To what extent, and when, the United States will in justice and equity be liable, if ever, to the creditors of the Republic of Texas, because of a lien held by them upon the revenue of that Republic to arise from duties on imports, and the transfer, by the act of annexation to the United States of the sole and exclusive power to levy money by duties on customs, imports, and tonnage, is not a question which the Executive of the United States can decide. That question belongs properly to the Congress of the United States, which has not as yet assumed to pay the debts of Texas.

That question, if there be any, of the liability of the United States in the premises, goes deeper, indeed, than the mere fact of revenue from customs expressly or specially pledged; for all the revenues of Texas, even where, as in the case of outstanding and unliquidated accounts for supplies and services, not expressly pledged, were yet impliedly engaged for the payment of all the debts of the Republic. And though the accession of Texas to the American Union relieved her of the burdens, and consequent expenses, military and civil, of separate nationality, still it deprived her of certain revenues, which became irrevocably vested in the United States.

A public creditor, like a private creditor, has a general right to receive payment out of the property, income, or means of his debtor. A special pledge of this or that source of revenue, of this or that direct tax, or indirect tax, when made by a government, renders such source of revenue, like a mortgage or deed of trust given by a private individual to his creditor, a specific lien, a fixed encumbrance, which the government ought not, in justice to the creditor, to abolish, lessen, or alienate, until the debt has been satisfied. But a public creditor, like a private one, even as to debts not secured by hypothecation of specific property or other express lien, ought not to deprive himself of the means of payment; as the two governments, that of Texas and of the United States, abundantly indicated, as well by the compact of annexion as by that for the change of boundaries.

I waive, therefore, as irrelevant to the present object, all inquiry as to what Congress ought to do in the premises, in con-

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sequence of the absorption, by the United States, of the revenues from duties of imposts and tonnage, which might have accrued to the Republic of Texas if she had not consented to become one of the United States of America.

Secondly, then, comes the other great branch of inquiry, whether or not the United States can deliver up to Texas a part of the reserved stock, on receiving releases of a correspondent part of the debt of the Republic.

Mr. Corwin thought not, and his opinion was concurred in by the late Executive. Of this interpretation of the compact some of the creditors of Texas complain, and also the authorities of Texas; for, if that be the true exposition of the compact, inasmuch as some of the creditors of Texas, whose claims are reduced by the scale of depreciation, adopted by the legislature of that State, refuse absolutely to give releases, then Texas cannot receive the remaining five millions of stock without some further compact between her and the United States, or some other legislation by Congress.

Nevertheless, in this part of the case, I cannot, on mature reflection, bring myself to a conclusion different from that of the late Executive, namely, that the reserved stock must be delivered *en bloc* after all the requisite releases shall have been filed in the Treasury of the United States.

This particular question has been argued in the contrary sense, with great ability, by counsel of deservedly high estimation, (Mr. Francis B. Cutting;) which fact requires me to state, in brief, some of the considerations, which chiefly influence my mind to the conclusions above intimated.

The words of the condition, as to the withholding the delivery to Texas of the reserved five millions of stock, are:

“Until the creditors of the State holding bonds and other certificates of stock of Texas for which duties on imports were specially pledged, shall first file, at the Treasury of the United States, releases of all claim against the United States for or on account of said bonds or certificates, in such form as shall be prescribed by the Secretary of the Treasury, and approved by the President of the United States.”

Now, it is admitted on the other side, that the literal, and, indeed, the legal import of these words is, that all the creditors

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of Texas, holding the specified evidence of her debt, may be required to release before delivering to Texas any part of the reserved five millions.

It is admitted, also, that, by the ordinary rules of law, the United States may insist upon the exact and complete fulfilment of the condition.

It is further admitted that, even in equity, there is no power to dispense with conditions imposed by *statutes*, either in form or substance.

But, notwithstanding all this, it is urged that here is a contract between Texas and the United States, and that the United States may construe it as a court of equity would construe any contract, and give execution to it equitably, and that such equitable execution would be to receive releases in part of such as choose to release, and then to deliver stock *pro tanto* to Texas.

I reply, as to the power of the United States to construe the contract as a court of equity, that the *Executive* has no such authority. The contract is, on one side, an act of Congress, by which the President of the United States has authority to prescribe *the form of the releases*, but has no discretion whatever as to the substance of the contract. If the substance of the contract involve inconveniences of any sort, either to the United States or to Texas, or to any of the creditors, it is for Congress, in conjunction with Texas, to make the requisite modifications of the contract; not for the President of the United States, either with or without the consent of Texas.

I reply, as to the alleged equitable import of the contract, that it assumes premises not established to my satisfaction. The legal tenor of the compact is, that a certain description of debts shall be wholly released before the delivery of the reserved five millions, or any part of the same, to Texas. Congress has prescribed a general discharge of the debt as the condition precedent of the delivery of the stock. To make an apportionment of the debt, and a delivery of stock *pro rata*, as by the chancery discretion of a court of equity, is to assume that the amount of the debt is absolutely fixed, and is less than the five millions, beyond all peradventure. But this, in my opinion, is not so. The debt embraced in the compact, even as scaled by Texas, and according to my reduced view of its amount, approaches to

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the sum of five millions, when the accruing interest is added. True, Texas has stopped the interest. But *non constat* that Texas will adhere to this determination, either in regard of principal by scale, or interest thereon. And the face of the debts comprehended in the compact, with interest accrued, is nearly double the five millions. Texas, in the exercise of her sovereignty as a State, has tendered payment to her creditors of a less sum, and with cessation of interest, as being all which she now thinks to be fairly due them. I have no occasion, nor will I presume, to judge her act. But the same sovereign power which enacted the laws of March 20th, 1848, and January 31st, 1852, to provide for ascertaining, liquidating, and paying the debt of the Republic of Texas, may, if it please, modify the same, and provide a new rule of payment for the creditors of the Republic.

Whatever there may be of hardship in either view of the subject, whether to creditors willing or to creditors unwilling to release, and whatever may be the relation of either view to the interest on the reserved stock in the Treasury of the United States,—these, it seems to me, are questions for Congress, not for the Executive, to determine. Suffice it that, by the terms of the compact, the reserved stock is not to be apportioned among the creditors according to their convenience, nor delivered by the United States to them, but to the State of Texas.

In conclusion, then, as to this branch of the subject, my opinion is in accordance with that of Mr. Corwin and the late Executive: that, until sufficient evidence of release of the United States from *all claim* for or on account of the bonds and certificates of stock required to be released shall have been filed at the Treasury of the United States, no part of the said reserved five millions can be delivered to the authorities of Texas. No apportionment *pro rata*, according as releases are filed, can be lawfully permitted.

If the creditors give to the United States sufficient releases, or if the creditors surrender to Texas the secured bonds and certificates of stock, and accept new securities from Texas, or if Texas pays the bonds and certificates in question, in either of the two last cases the said original bonds and certificates being filed at the Treasury Department of the United States,

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with proper evidence of the extinguishment of claim by virtue of the said bonds or certificates:—then, in either of these three cases, the condition of the compact in relation to the reserved five millions will have been substantially fulfilled, and the certificates of the reserved five millions of stock of the United States may be delivered to Texas.

I have the honor to be, very respectfully, your obedient servant,

C. CUSHING.

Hon. JAMES GUTHRIE,
Secretary of the Treasury.

DUTY OF ATTORNEY GENERAL.

The Attorney General has no lawful right to give advice to individuals on matters affecting the Government, or to entertain appeals from parties on questions of law decided by the Departments; but only to give advice on public matters when required by the President, or requested by any head of Department, or by the Solicitor.

ATTORNEY GENERAL'S OFFICE,

October 12, 1853.

SIR: I have the honor to acknowledge the reception of your letter of the 4th instant, stating a claim against the United States and requesting my opinion thereon; and I have in reply to say, that my duty is limited, in matters affecting the United States, to giving advice to the Government itself, and, of course, forbids my giving opinions to individuals in regard to claims of theirs against the Government.

I am, very respectfully,

C. CUSHING.

SAMUEL A. HALE, Esq.

Surrender of Deserting Seamen.

SURRENDER OF DESERTING SEAMEN.

The statute provision for the surrender of deserting seamen, applies only to the seamen of governments with which a treaty exists to that effect.

There is no express provision to that effect in existing treaties between the United States and Denmark.

In the construction of treaties, the general doctrine is, that any special advantage conceded by a party under one article of the compact is in consideration of all the advantages enjoyed by the same party under that and all the other articles.

Engagements of extradition, whether of fugitives from justice or from service, stand in each case on particular stipulations of treaty, and are not to be inferred from the "favored nation" clause in treaties.

ATTORNEY GENERAL'S OFFICE,

October 14, 1853.

SIR: I have considered the question presented by the communication of Mr. Bille, Charge d'Affaires of Denmark, of the 26th of August, referred by you to me, and submit herewith my conclusions thereon.

On occasion of the arrest in New York of a deserter from the Danish ship "Saga," and the discharge of the alleged deserter by the authorities there, on the assumption that there is no lawful authority for such arrest, Mr. Bille appeals to the Government of the United States for its decision and action in the premises.

An act of Congress, enacted March 2d, 1829, entitled "An act to provide for the apprehension and delivery of deserters from certain foreign vessels in the ports of the United States," (iv Stat. at Large, p. 359, chap. 41,) provides, "That, on application of a consul or vice consul of any foreign government, having a treaty with the United States stipulating for the restoration of seamen deserting, made in writing, stating that the person therein named has deserted from a vessel of any such government while in any port of the United States;—and on proof by the exhibition of the register of the vessel, ship's roll, or other official document, that the person named belonged, at the time of desertion, to the crew of said vessel,—it shall be the duty of any court, judge, justice, or other magistrate having competent power, to issue warrants to cause the person to be arrested for examination; and if, on examination, the facts stated are found to be true, the person arrested, not being a citizen of the United States, shall be delivered up to said consul, or vice consul, to be sent back," &c.

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The statute expressly requires a treaty between the United States and the given foreign government, "stipulating for the restoration of seamen deserting," as the premises and groundwork of the jurisdiction conferred in the particular subject-matter.

But the treaties between Denmark and the United States do not contain any stipulation for the restoration of deserting seamen; and, upon a superficial view of the subject, here would seem to be the answer to the inquiry propounded by Mr. Bille.

But the treaty between the United States and Denmark of the 26th of April, 1826, gives to Denmark, and to her consuls, the rights of the most favored nation in the ports of the United States; and Mr. Bille infers that the stipulation as to deserting seamen, contained in treaties between the United States and sundry other governments, is to be considered as applying to Danish seamen; and he refers to the clause on the subject in our treaty with Sweden and Norway.

The stipulations in the Danish treaty, which he cites, are the following:

Art. i. "The contracting parties, desiring to live in peace and harmony with all the other nations of the earth, by means of a policy frank and equally friendly with all, engage mutually not to grant any particular favor to other nations, in respect of commerce and navigation, which shall not immediately become common to the other party, who shall enjoy the same freely, if the concession were freely made, or on allowing the same compensation, if the concession were conditional."

"Art. viii. To make more effectual the protection which the United States and his Danish majesty shall afford in future, to the navigation and commerce of their respective citizens and subjects, they agree mutually to receive and admit consuls and vice-consuls in all the ports open to foreign commerce, who shall enjoy in them all the rights, privileges, and immunities, of the most favored nation, each contracting party, however remaining at liberty to except those ports and places in which the admission and residence of such consuls may not seem convenient." (viii Stat. at Large, 340.)

The treaty between the United States and Sweden and Nor-

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way, concluded the 4th of July, 1827, contains the following provision:

Art. xiv. "The said consuls, vice consuls, or commercial agents, are authorized to require the assistance of the local authorities for the arrest, detention, and imprisonment of the deserters from the ships of war and merchant vessels of their country, and for this purpose, they shall apply to the competent tribunals, judges, and officers, and shall in writing demand said deserters, proving by the exhibition of the registers of the vessels, the rolls of the crews, or by other official documents, that such individuals formed part of the crews, and on this reclamation being thus substantiated, the surrender shall not be refused.

"Such deserters when arrested, shall be placed at the disposal of the said consuls, vice-consuls, or commercial agents, and may be confined in the public prisons at the request and costs of those who claim them, in order to be sent to the vessels to which they belonged, or to others of the same country. But if not sent back, within the space of two months, reckoning from the day of their arrest, they shall be set at liberty, and shall not again be arrested for the same cause.

"It is understood, however, that if the deserter should be found to have committed any crime or offence, his surrender may be delayed until the tribunal before which the case shall be depending shall have pronounced its sentence, and such sentence shall have been carried into execution."

Provisions analogous to this are contained in the several treaties between the United States and the governments of Austria, Belgium, Brazil, Central America, Chili, China, Colombia, Ecuador, France, Greece, Guatemala, Hanover, the Hanseatic towns, the Hawaiian Islands, Mecklenburg-Schwerin, Mexico, New Grenada, Peru, Portugal, Prussia, Russia, Sardinia, the Sicilies, Spain, Sweden and Norway, Venezuela, concluded at different periods, from the oldest of our treaties, that with France of 1778, down to the present time.

On the other hand, the stipulation as to the surrender of deserting seamen is not contained in the treaties between the United States and the following powers, namely: Algiers, Bavaria, Costa Rica, Denmark, Great Britain, Morocco, Muscat,

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Netherlands, Ottoman Porte, Siam, Tripoli, Tunis, and Wurtemberg.

And the question is,—Whether the “favored nation” clause in the treaty with Denmark, or in any other of the treaties of this second class, draws after it the proceedings as to deserting seamen in the treaty with Sweden and Norway, or any other of the treaties of the first class. I think not.

If the United States should, by their own law, and of their own mere will and concession, enact any benefit of commerce or navigation in favor of a particular nation, it is conceded that the terms of our treaty with Denmark would entitle her to enjoy the same benefit,—freely, if such concession were freely made,—or on allowing the same compensation, if the concession were conditional, the same in every case so long as the particular law should remain in force and unrepealed;—for any such law, being enacted by the sole power and will of Congress, might be for certain or for indefinite time, and could be repealed at the pleasure of the United States.

But the stipulations before cited, between the United States and other powers, are not favors in respect of commerce and navigation, but contracts, solemn compacts, obliging the honor and good faith of both contracting parties. So long as the particular treaty endures, neither party can, of its own mere will and pleasure, abrogate such agreement except under agreed conditions;—the league, *ligamen*, can be rightfully dissolved only by the same mutuality of consent by which it was tied, according to its tenor as the case may be.

Now, in the treaties and conventions between nations, the general doctrine is that any special advantage conceded by a party under any one article of the compact is in consideration of all the advantages enjoyed by the same party under that and all other articles of the treaty. Each particular article is consented to by each party in consideration of all the other articles, and all the articles united form the consideration of each particular article.

Vattel lays down the rule as follows:—“We cannot consider the several articles of the same treaty as so many distinct and independent treaties; for, though we do not see any immediate connection between some of those articles, they are all con-

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nected by this common relation, viz.: that the contracting powers have agreed to some of them in consideration of the others, and by way of compensation. I would, perhaps, never have consented to this article, if my ally had not granted me another, which, in its own nature has no relation to it. Everything, therefore, which is comprehended in the same treaty, is of the same force and nature as a reciprocal promise, unless where a formal exception is made to the contrary." (Vattel, book ii., chap. xiii., p. 214, 215. See also Grotius de Jure Belli ac Pacis, l. ii. cap. 15, s. 15; Wildman's Institutes, vol. i., p. 174.)

It is obvious, therefore, that as a treaty is one fact, to be observed and fulfilled in all its conditions, whether of advantage or disadvantage, neither of the contracting parties can rightfully select one of the articles by reason of the benefits flowing therefrom, and reject other articles because of the inconveniences involved in their execution. And, by still stronger reason, another power, not a party to the given treaty, can have no right, under claim of a "favored nation" clause in its treaty, to make selection of one particular article of the former treaty, and insist on the enjoyment of the advantages to result from the performance of the selected article.

Hence, the expressions in the first and eighth articles of the treaty with Denmark, and similar expressions in other treaties, as "favor," or "freely if the concessions were freely made," or "if the concessions were conditional on allowing the same compensation," are not applicable to advantages growing out of treaties containing various articles of reciprocal pact and stipulation; for such advantages are purchased upon consideration, upon mutual and correlative engagements, positively binding the good faith of the contracting parties, with perfect reciprocal obligation in terms and manner as to the things to be done or suffered. Such treaty benefits are not favors, boons, or concessions. These expressions apply only to things proceeding from the mere will and pleasure of the state granting them, in matters within its own sole jurisdiction, and which the other party, to whom they are proffered, may or may not, in its own good pleasure, accept.

For example, if the United States should, by their own law, grant, that iron in bars, bolts, or rolled, and iron prepared for

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railways, of the product and manufacture of Sweden, may be imported into the United States, directly from Sweden, upon condition of paying a duty of ten per centum ad valorem,—and that Swedish vessels, laden solely with Swedish iron, may enter the ports of the United States, free of duty on tonnage,—then Denmark might, perhaps, rightfully claim, under its treaty with the United States, that iron of like kind, of the product and manufacture of Denmark, imported into the United States directly from Denmark, should pay no other or higher duty than ten per centum ad valorem, and that Danish vessels, laden solely with Danish iron, should be permitted to enter the ports of the United States, free from duty on tonnage; because the grant to Sweden and Norway was of favors, upon condition as to the merchandise, and freely as to the tonnage, and the same compensation could be paid by Denmark as was conditionally granted to Sweden. If, however, in a treaty between the United States and Sweden, the like terms, as to Swedish iron and vessels to be admitted in the ports of the United States, should be stipulated, and that cotton and manufactures of cotton, and tobacco and manufactures of tobacco, of the growth and product of the soil or industry of the United States, should be admitted into the ports of Sweden and Norway, and of the island of St. Bartholomew's, paying thereon no higher duties than at the rate of fifteen per cent. ad valorem, with various other articles of mutual and reciprocal stipulations;—in such case Denmark could not claim that the iron and iron manufactures of the product and industry of Denmark, and the vessels of Denmark, should be admitted into the ports of the United States upon the same terms as Swedish iron and Swedish vessels;—because, in the case supposed, there would not be favors conceded by the United States to Sweden, but advantages purchased by Sweden of the United States, in consideration of the admission of cotton and tobacco, and the manufactures thereof, of the product of the soil and industry of the United States, upon the terms mentioned in the treaty, and of the other stipulations on the part of Sweden, to be performed towards the United States;—and because the advantages to the United States, arising from the stipulations by Sweden and Norway, could not be affirmed to be equally compensated by the

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like terms performed by Denmark towards the United States ; —and the difference of compensation due to the United States from Denmark for such like terms of commerce and navigation, could not be determined by any certain standard, but could be adjusted only by a convention between the United States and Denmark.

The summary arrest and delivery up of deserters from the service of other nations, like the surrender of fugitives from their criminal justice, when found in the territory of a country into which they have escaped or fled, is not a duty absolutely enjoined by the law of nations, but a subject of special convention. So also are the authority and jurisdiction of consuls and commercial agents in regard to demanding and superintending the arrest, detention, and surrender, either of deserters from service or fugitives from justice. These are matters referable to the regulation of the internal police of a country, or its political relations to other nations, rather than to commerce or navigation as such, although often treated of in connection with regulations of commerce, navigation, settlement of boundaries, or other matters of treaty arrangements.

The jurisdiction over persons, and their protection against unlawful arrests, detentions, and imprisonment, are, in regard of the general subject-matter, among the rights reserved to the respective States.

The Constitution of the United States contains, however, sundry exceptional provisions in regard to rights of persons. Thus it invests the Federal Government with jurisdiction to cause a person, charged with treason, felony, or other crime, who shall flee from the justice of one of the States of the Union, and be found in another, to be delivered up on the demand of the executive authority of the State from which he fled, to be removed to the State having jurisdiction of the crime ; and also to cause persons held to service or labor in one of the States of the Union, or of the territories belonging to the United States, escaping into another, to be delivered up on claim of the party to whom such service or labor may be due. Upon each of which subjects the Congress of the United States has passed statutes regulating the manner of arrest, detention, and delivery of such

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persons, on proper demand of those having authority to return them to the several States.

But the jurisdiction of the Government of the United States, to cause fugitives from the justice, or deserters from the service, of a foreign nation, to be arrested, detained, and delivered up, on the demand of such foreign nation or its officers, is not founded on express provisions of the Constitution. It is derived from the treaty-making power, which the Constitution has vested in the President, to be exercised by him by and with the advice and consent of the Senate. The Constitution does not impose any special limitations on the treaty-making power. It is quite general in its tenor and scope, though doubtless not without some limitations in the very nature of the Government, as well as the spirit of the Constitution. It embraces, however, beyond all doubt, the subject of either fugitives from justice, or deserters from service; and accordingly justifies the numerous treaties, which have been negotiated with stipulations *in hæc materia*, to carry which into effect is the object of the appropriate acts of Congress.

I conceive that all stipulations of international extradition, whether of fugitives from justice or from service, stand, in every case, upon the particular treaty of which they are a part, and are not to be held as being comprehended by relation in the "favored nation" clause.

The opposite doctrine would conflict with the very nature of sovereignty, and the perfect obligation and reciprocal bond which every treaty imposes on the powers of sovereignty. It assumes that a treaty may be disjointed; that a fragment of it may be made reciprocal or not reciprocal, obligatory or not obligatory, at the option of a party, according as he may deem it advantageous or burdensome. It assumes that unequal things are equal; that a part is equivalent to the whole; that the value of compensation, stipulated in a single article, is equi-ponderant with the sum of all the compensations stipulated in all the articles of the same treaty. It assumes that the value of all the articles of a treaty between two nations, of a given quantity of territory, number of ports and harbors, amount of population, variety of productions, and other elements of commerce and navigation, is no greater than, but may be fully com-

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pensated by, one single article of that treaty, selected and adopted by a third nation, with less of possessions, population, exchangeable commodities, and other elements of commerce and navigation.

In fine, the assumed theory proceeds on a series of fallacies, namely, that there is equality of political and commercial relations between all nations; and that every article of reciprocal treaty between any two nations, is of equal weight and consideration, having an established invariable value, so that it may be exchanged between any two nations at that fixed value:—all which are assumptions contrary to the nature and truth of things.

To apply these general doctrines to the particular subject: I am of opinion that the act for the apprehension of deserters from certain foreign vessels, cannot be applied to the case of a Danish mariner, until there be an express provision of treaty between Denmark and the United States, for the restoration of deserting seamen, analogous to that in the treaty between the United States and Sweden and Norway; and that, without such treaty, the executive or judicial authorities of the United States have no power to arrest, detain, and deliver up a mariner on the demand of the consuls or other agents of Denmark.

I have the honor to be, very respectfully, your obedient servant,

C. CUSHING.

Hon. WILLIAM L. MARCY,
Secretary of State.

MILITARY RESERVATIONS IN OREGON.

Decision as to the quantity of land to be reserved for public use, and the places where to be located, rests in the discretion of the President, subject to such regulations as may from time to time be provided by law, either as to the particular public use, the quantity, or the subsequent disposal thereof for private use.

At present, the statute limitation as to quantity is not exceeding six hundred and forty acres for forts, and twenty acres for any other public use. Subject to this condition, the military reservation of Fort Vancouver in the Territory of Oregon is valid, notwithstanding any pre-existing donation claim of an inhabitant of the Territory, and notwithstanding the Provisional Government of Oregon had located the county seat of justice at Fort Vancouver.

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ATTORNEY GENERAL'S OFFICE,

October 15, 1853.

SIR: I have examined the question, which you were pleased to refer to me, as to the power of the Executive to make certain reservations in the Territory of Oregon.

In general, the decision as to the quantity of land to be reserved for public use, and the places where to be located, rests in the discretion of the President, subject to such regulations as Congress may from time to time make, either as to the particular public use, or the quantity capable of reservation therefor, or as to the disposal, for private use, of the whole or any part of that which may have been set apart for public use.

The present case involves the consideration of particularities in the political condition of Oregon, and of special legislation bearing on the facts calling for the decision of the President.

It appears that in October, 1850, Col. Loring, then commanding at Fort Vancouver, in Oregon, published a notice, that the land, within the boundaries "commencing where a meridional line two miles west of the United States Flagstaff at Fort Vancouver strikes the north bank of the Columbia river, thence due east four miles, thence due south to the north bank of the Columbia river, thence down the bank to the place of beginning," subject only to "the lawful claims of the Hudson's Bay Company, as guarantied by treaty between the United States and Great Britain," was reserved for the military purposes of the United States; and it was further notified that all improvements within the described limits, made by resident settlers prior to said notice, would be appraised and paid for according to law.

The reservation thus made includes Fort Vancouver, the barracks of the United States at that place, the picketing of the Hudson's Bay Company, and also a settlement and improvements made by Amos M. Short, a citizen of the United States. It was in due time submitted to the late President for his approval, but remained without being acted upon, probably because of objections raised, as hereafter explained, on the part of said Short and of some other inhabitants of the Territory of Oregon.

Short, who is a donation claimant, objects, under the impres-

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sion that payment for his improvements would be inadequate compensation for the loss of the land.

Many inhabitants of Oregon object,

1. Alleging that the reservation cannot rightfully be made, because an act of the Provisional Government located the county seat of justice in Clarke county at Fort Vancouver; 2. Alleging the inexpediency of the reservation, as embracing an amount of land unnecessarily large, situated in the heart of settlements, and away from the frontier, where alone, as they think, the public welfare requires the troops of the United States to be posted.

What may be public policy in regard to the fact of a military reservation at that place, it belongs, of course, to the President to determine, as an executive question; my duty being limited to the inquiry of the legal authority of the President in the premises, so far as regards either the fact of reservation or the quantity of land legally subject to reservation.

It is to be remembered, that the ambiguous political condition of the territory on the north-west coast of America, and the state of uncertainty and of doubt which had for so long a time prevailed as to the sovereignty and government thereof, were at last terminated by an amicable compromise of the conflicting pretensions of Great Britain and the United States, by the treaty of June 18th, 1846, "regarding limits westward of the Rocky Mountains." (ix Stat. at Large, p. 869.)

Immediately anterior to the final settlement of the respective claims and rights of Great Britain and the United States by that treaty, and the establishment of a regular territorial government in Oregon by Congress, the inhabitants of that country, of their own spontaneous motion, had organized a provisional government, which gave place to the present organization by virtue of the act of August 14th, 1848, entitled "An act to establish the territorial government of Oregon," (ix Stat. at Large, p. 323,) which enacts as follows:

Sec. 6. "That the legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States; but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United

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States," &c. * * * "All the laws passed by the Legislative Assembly shall be submitted to the Congress of the United States, and if disapproved, shall be null and of no effect: * * * and all such laws, or any law or laws inconsistent with the provisions of this act, shall be utterly null and void."

Sec. 14. "That the existing laws now in force in the Territory of Oregon, under the authority of the provisional government established by the people thereof, shall continue to be valid and operative therein, so far as the same be not incompatible with the Constitution of the United States and the principles and provisions of this act; * * * but all laws heretofore passed in said Territory making grants of land, or otherwise affecting or encumbering the title to lands, shall be, and are hereby declared to be, null and void; and the laws of the United States are hereby extended over and declared to be in force in said Territory so far as the same or any provision thereof may be applicable."

Another act, approved September 27th, 1858, (ix Stat. at Large, p. 496, ch. 76,) entitled "An act to create the office of Surveyor General of the public lands in Oregon, and to provide for their survey, and to make donations to settlers of the said public lands." Sec. 4 makes donations of lands to such as had settled, or who should thereafter settle, to embrace the land actually occupied and cultivated, upon the continuation of residence and cultivation for four years, and in the quantities, and upon compliance with the other conditions, of this act. Sec. 6 provides for surveys of these donation rights, to be made by the Surveyor General.

Sec. 7 requires a settler, who claims a donation right under this act, to prove to the satisfaction of the Surveyor General, or of such other officer as should be appointed by law for that purpose, "that the settlement and cultivation required by this law had been commenced, specifying the time of the commencement; and at any time after the expiration of four years from the date of such settlement, whether made under the laws of the late provisional government or not." It also requires that he "shall prove in like manner, by two disinterested witnesses, the fact of continued residence and cultivation, required by the fourth section of this act, and upon such proof being made,

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the Surveyor General or other officer appointed for that purpose shall issue certificates * * *, and if the Commissioner of the General Land Office shall find no valid objection thereto, patents shall issue for the land according to the certificates aforesaid upon the surrender thereof."

Sec. 11 provides, "That nothing in this act contained shall be so construed or executed as in any way to destroy or affect any rights to land in said Territory holden or claimed under the provisions of the treaty or treaties existing between this country and Great Britain." Sec. 14, * * * "that such portions of the public lands as may be designated, under the authority of the President of the United States, for forts, magazines, arsenals, dockyards, and other needful public uses, shall be reserved and excepted from the operation of this act: Provided that, if it shall be deemed necessary in the judgment of the President to include in any such reservation the improvements of any settler made previous to the passage of this act, it shall, in such case, be the duty of the Secretary of War to cause the value of such improvements to be ascertained, and the amount so ascertained shall be paid to the party entitled thereto, out of any money in the Treasury not otherwise appropriated."

This act of September 27th, 1850, was amended by an act approved 14th February, 1853, (Session Acts, p. 158, ch. 69,) by the 9th section of which it is enacted, "That all reservations, heretofore as well as hereafter made in pursuance of the fourteenth section of the act to which this is an amendment, shall, for magazines, arsenals, dockyards, and other needful public uses, except for forts, be limited to an amount not exceeding twenty acres for each and every of said objects at any one point or place, and for forts to an amount not exceeding six hundred and forty acres at one point or place: Provided that if it shall be deemed necessary in the judgment of the President to include in any such reservation the improvement of any settler made previous to such reservation, it shall, in such case, be the duty of the Secretary of War to cause the value of such improvement to be ascertained: and the amount so ascertained shall be paid to the party entitled thereto, out of any money in the Treasury not otherwise appropriated."

Upon a view of these acts of Congress, considered in the light

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of the treaty of settlement and limits, it is evident, that until the passage of the act of September 27th, 1850, no citizen of the United States, or other persons, could have lawful claim to lands in the Territory of Oregon by derivation under the sovereignty and government of the United States; for by the 6th and 14th sections of the act of August 14th, 1848, all acts of the Provisional Government of Oregon created by the people, "making grants of land or otherwise affecting or encumbering the title to lands," and any laws passed by the Territorial Government "interfering with the primary disposal of the soil," were declared to be null and void.

Now, the act of Congress of September 27th, 1850, which is the first cause and the origin of lawful claims to land in Oregon under the sovereignty and government of the United States, subjected all such claims, *ab initio*, to the provisions (comprised in the 14th section) for reservations for forts, magazines, arsenals, dockyards, and other needful public uses; and the amendatory act of the 14th of February, 1853, (in its 9th section,) contains the like reservations and exceptions in respect of the public need for magazines, arsenals, dockyards, forts, and other public uses.

That is to say, while the lands in Oregon were of the public property, unreserved from the public domain, the very laws, which provide the manner of acquiring private rights and interests therein, directed that reservations for public uses might be made, so as to save the exercise of the right of eminent domain after patents shall have been issued to individual proprietors.

I can see nothing in the fact of the improvements by Mr. Short, or any other settler, made before the passage of the act of September 27th, 1850, or before that of February 14th, 1853, or indeed before the consummation of a reservation for the public use, to preclude the exercise of the powers vested in the President of the United States by those acts, which expressly authorize him, in making reservations, to include improvements by settlers, and provide the means of compensation, so as to embrace unequivocally the case of Mr. Short.

The other objection to the power of the President in the premises, to wit, the act of the local legislature in fixing on Fort Vancouver as the seat of justice for the county of Clarke, and

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the approval thereof, by the Congress of the United States, does not seem to me to have any solid foundation in public law.

It is idle to suppose that the legislature of the Territory in passing the law, or that Congress in approving it, intended to divest the United States of the title and use of the fort and barracks at Fort Vancouver.

The continuance of the title to the fort in the United States, with the additional reservation to a lawful amount, will in no respect or manner obstruct the holding of the courts and the transaction of the other county business. And if such an act of local legislation could, by strong imagination, be of itself construed into a grant of the land, or as affecting or encumbering the title of the United States, then such act of the local legislature is *ipso facto* null and void by express provision of the act of Congress.

But the unlimited discretion of the President as to the quantity of land to be reserved for public purposes, conferred by the 14th section of the act of September 27th, 1850, has been taken away by the 9th section of the act of February 14th, 1853, which provides, as before stated, "That all reservations heretofore, as well as hereafter made, &c., shall, for magazines, arsenals, dock-yards, and other needful public uses, except for forts, be limited to an amount not exceeding twenty acres for each and every of said objects at any one point or place, and for forts to an amount not exceeding six hundred and forty acres at any one point or place."

Subject to these limitations, the President possesses, in my opinion, the rightful power and authority to direct such reservations of the public domain in the late Territory of Oregon, now divided into the Territories of Oregon and Washington, as he in his discretion shall think meet, anything in the objections made by Amos M. Short and the other petitioning inhabitants of Oregon to the contrary notwithstanding.

As nothing has yet been legally consummated under Colonel Loring's proposed reservation of some four miles square, the President is, of course, still free to exercise his own discretion, subject to the limitation above expressed, in directing the quantity, place, uses, and relation to donation rights, of the reservation at Fort Vancouver.

Deposit of Ship's Papers with Consuls.

It may be proper to say, in passing, that the Hudson's Bay Company, whose rights are saved by the terms of the reservation, do not object to the proposed reservation, but, on the contrary, desire it shall be approved, thinking it may be an additional safeguard against encroachment on their rights by settlers. If it were otherwise, however, and they did object, my conclusion would be the same; for their rights are possessory only, and cannot either legally or politically stand in the way of any public emergency of this sort appertaining to the sovereign powers of the United States. The same remark applies to the farms and lands of the Puget Sound Agricultural Company, the whole or any part whereof the United States are entitled by the treaty to take, on signifying the desire so to do, at a proper valuation to be agreed upon between the two Governments.

I have the honor to be, very respectfully, your obedient servant,

C. CUSHING.

To the PRESIDENT.

DEPOSIT OF SHIP'S PAPERS WITH CONSULS.

In order that the master of a ship, on her "arrival" in a foreign port, shall be compellable to deposit the ship's papers with the Consul, the arrival must be such an one as involves entry and clearance.

ATTORNEY GENERAL'S OFFICE,

October 17, 1853.

SIR: Inquiry is made of me by the Acting Secretary of State, under date of the 6th inst., as to the legality of instructions, requested of the Department by the Commercial Agent of the United States at St. Thomas, in the following words:

"Masters of vessels, which enter the upper or main harbor, and exhibit their registers at the Custom House here, and receive a 'let-pass;' vessels remaining at this port twelve hours; vessels discharging or taking in seamen; vessels entering into a charter for taking freight from other islands or ports not under the jurisdiction of this agency; vessels taking in provisions or supplies, or doing any other act whereby the interven-

Deposit of Ship's Papers with Consuls.

tion of the commercial agent is or might be needed,—are required to deposit with the Agent the registers, as required by the act of Congress, and contemplated by the decision of the Supreme Court of the United States.”

In my opinion, the proposed instructions are broader than the law will justify.

An act of Congress, approved April 21st, 1792, entitled, “An act concerning Consuls and Vice-Consuls,” (i Stat. at Large, p. 254,) prescribes various duties and powers of consuls and vice-consuls, and fixes their fees for different services.

Section 2d authorizes them to receive “the protests or declarations, which such captains, masters, crews, passengers, and merchants, as are citizens of the United States, may respectively choose to make there; and also such as any foreigner may choose to make before them, relative to the personal interest of any citizens of the United States; and the copies of the said acts, duly authenticated by the said consuls and vice-consuls, under the seal of their consulates, respectively, shall receive faith,” &c.

“Section 9th, * * * That the specification of certain powers and duties in this act, to be exercised by consuls and vice-consuls of the United States, shall not be construed to the exclusion of others, resulting from the nature of their appointments, or any treaty or convention under which they may act.”

An act supplementary to the “Act concerning consuls and vice-consuls, and for the further protection of American seamen,” was approved 28th February, 1803, (ii Stat. at Large, p. 203,) and contains the following, among other provisions:

Section 1. “That before a clearance be granted to any vessel, bound on a foreign voyage, the master thereof shall deliver to the Collector of the Customs a list, containing the names, places of birth, and residence, and a description of the persons who composed his ship's company, to which list the oath or affirmation of the captain shall be annexed, * * * and the said collector shall deliver him a certified copy thereof,” &c.

“Section 2. * * It shall be the duty of every master, or commander of a ship, or vessel, belonging to citizens of the United States, who shall sail from any port of the United States, after the first day of May next, on his arrival at a foreign port, to deposite his register, sea-letters, and Mediterranean passport,

Deposit of Ship's Papers with Consuls.

with the consul, vice-consul, commercial agent, or vice-commercial agent, if any there be at such port; that, in case of refusal or neglect of the said master or commander to deposit his papers as aforesaid, he shall forfeit and pay five hundred dollars, to be recovered by the said consul, vice-consul, commercial agent, or vice-commercial agent, in his own name, for the benefit of the United States, in any court of competent jurisdiction; and it shall be the duty of such consul, vice-consul, commercial agent, or vice-commercial agent, on such master or commander producing to him a clearance from the proper officer of the port where his ship or vessel may be, to deliver, to the said master or commander, all of his said papers: Provided, such master or commander shall have complied with the provisions contained in this act, and those of the act to which this is a supplement."

"Section 3. That whenever a ship or vessel, belonging to a citizen of the United States, shall be sold in a foreign country, and her company discharged, or when a seaman or mariner, a citizen of the United States, shall, with his own consent, be discharged in a foreign country, it shall be the duty of the master or commander, to produce to the consul, vice-consul, commercial agent, or vice-commercial agent, the list of his ship's company, certified as aforesaid; and to pay to such consul, vice-consul, commercial agent, or vice-commercial agent, for every seaman or mariner so discharged, being designated on such list as a citizen of the United States, three months' pay, over and above the wages which may be then due such mariner or seaman," &c.

Section 4th makes it the duty of masters of vessels, belonging to citizens of the United States, and bound to some port of the same, to take on board, at the request of the consul, vice-consul, commercial agent, or vice-commercial agent, such mariners and seamen of the United States, who may be found destitute in their districts respectively, and to transport them to the United States, on terms not exceeding ten dollars for each seaman; no ship or vessel being bound to take a greater number than two men to every hundred tons burthen of said ship. And for refusal to do this, there is a forfeiture of \$100 for each mariner or seaman so refused.

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The Supreme Court of the United States, in the case of *Harrison v. Vose*, (ix Howard, p. 372,) was called upon to say whether the master of the brig *Openango*, belonging to citizens of the United States, had or had not incurred the penalty of \$500, under the second section of the act of 1808, before cited. The brig sailed from Eastport, in the State of Maine, in July, 1844, with a cargo of lumber, consigned to Messrs. Darrel & Barclay, merchants of Kingston, in the island of Jamaica; arrived at Port Royal, in the harbor of Kingston, on the 4th of September; came to anchor about a quarter of a mile from the town, but did not go up to the town, nor come to an entry, nor discharge any part of her cargo, nor take in cargo at Kingston, nor do any business, except to communicate with the consignees, by whom the master of the brig was informed that his cargo was sold, deliverable at Savannah la Mar, in the island of Jamaica; whereupon, the master, on the next day, (5th September, 1844,) sailed from the harbor of Kingston to Savannah la Mar, in the same island, there discharged cargo, and deposited, with the consul at Savannah la Mar, the ship's register, sea-letter, and Mediterranean passport: but did not deposit them with the consul at Kingston. It was in proof that the brig arrived at Kingston in the afternoon, and sailed the next morning, as soon as the wind would permit. And it was also in proof, by one of the Kingston pilots, that the master of a vessel, arriving at Kingston, is compelled by law to report his arrival at the custom house, whether his cargo had been previously deliverable at another port or not, but is under no necessity of coming to an entry.

Upon these facts, the Supreme Court of the United States was of opinion, that "it was not the duty of the defendant, who was master or commander of the ship or vessel called the *Openango*, on his arrival at Kingston, in the island of Jamaica, to deposit his register, sea-letter, and Mediterranean passport, with the United States Consul at said port."

After reasoning upon the object and intent of the act of Congress, and the duties belonging to consuls and commercial agents, the court say, "Our view, then, is, that the term *arrival*, as used in this act, must be construed according to the subject-matter,—to the object of the provision and expressions in other

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sections of this act, and in other like acts; and that, according to all these, a vessel, putting into a foreign port to get information, and getting it without going at all to the upper harbor or wharfs, and not entering, or repairing, or breaking bulk, or discharging seamen, or being bound homewards so as to take seamen, or needing the aid of a consul in any respect, but leaving the port, in a few hours, not doing any of these, nor being required to, and duly entering and delivering her cargo at a neighboring port, where it had been sold, and there depositing her papers with the vice-consul, cannot be said to have arrived at the first port, so as to come within the spirit of the penal provision as to depositing her papers with the consul. So far as regards precedents on this matter, the actual decision of one court and the opinions of two Attorneys General are in favor of our construction, (see the case of *Toler v. White*, in *Ware*, D. C. 275;) while the decision in *Carsons v. Hunter*, ii Sumner, 419, is not against it, though the reasoning is, and seems to unsettle the question.

"See also the opinions of the law officers of the Government at different periods,—June 11th, 1845, and September 26th, 1849,—coinciding that the arrival meant here must have been one followed by an entry and clearance.

"Their opinions, likewise, have, without doubt, been adopted by the Government, and our consuls instructed to conform to them, and this furnishes an additional consideration for not disturbing what is in operation under them; and especially, when a change would be merely to extend a severe penalty to a case doubtful in construction, and characterized by good intentions."

The opinions of the Attorney General, referred to by the Supreme Court of the United States, are of Mr. J. Y. Mason, (*ante*, vol. iv., p. 390,) and of Mr. Reverdy Johnson, (*Ibid.* vol. v., p. 161,) which opinions are also printed at large in the case of *Harrison v. Vose*, (ix Howard, p. 375, 376, 377.)

The opinion of the former was upon the case of the Consul at Nassau, of 16th April, 1845. "He states that his instructions to his agents have been to this effect, that any voluntary arrival at their ports obliges the master of the vessel, upon his arrival, to deposit his register, whether such arrival be for advices or not, or whether the vessel comes to an entry or not, and with-

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out respect to her remaining twenty-four hours, or any definite time." The opinion was that such instructions were not warranted by law.

The other opinion (of Attorney General Johnson) was upon the letter of F. H. Whitmore, of 10th September, 1849, "respecting the demand made by the United States Commercial Agent at St. Thomas, in all cases of the arrival of an American vessel at that port, whether business is, or is not done by her, that the register, &c., be deposited with him." Mr. Attorney General Johnson's opinion concurs with Mr. Mason's, that there is to be no deposit of the ship's papers upon an arrival, "unless it be an arrival with a view to entry, or where, by the local law, an entry is required.

"If an American vessel arrive at her port of discharge, or, if for any reason, other than the purpose of trading with the whole or a portion of her cargo, she shall remain so long that, by the law of the country, she must enter at the custom house of such port."

I think the doctrine to be collected from these authorities is, that, to incur the penalty for refusal to deposit the ship's papers with the consul, &c., as commanded by the second section of the act of 1803, the "arrival" there spoken of, must have been one followed by entry and clearance.

The body of the section contemplates an arrival at a foreign port, with clearance from the proper officer of the port. It is the production of the clearance to the consul, which gives to the master the right to demand a return of the ship's papers, and imposes on the consul the duty of returning them.

The proviso to the section allows the consul, notwithstanding the clearance from the proper officer of the port, to detain the ship's papers, until certain requirements of law shall have been complied with, which are: The payment of the fees due the consul for his services; the payment to him of three months' pay, in addition to wages due, for every discharged seaman, who is designated on the certified list of the ship's company as a citizen of the United States; and the taking on board, at the request of the consul, of destitute mariners for transportation to the United States.

This right of the consul attaches to the register and other

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papers, when they shall have been lawfully deposited with him ; but the statute does not compel the deposit for the purpose of giving the right of detention.

Neither the section of the act which regards discharged seamen, nor that which provides for distressed seamen, nor the legislation as to consuls' fees, requires a deposit of the register and other papers, although the former makes it the duty of the master to exhibit, to the consul, a certified list of the ship's company. And the proviso above cited does not enlarge the scope of the other provisions of law as to the deposit of the papers : it only relieves the consul from the duty, which would otherwise be imperative upon him, of returning the papers upon exhibition of the clearance alone.

I am of opinion, therefore, that the proposed instructions to the Commercial Agent at St. Thomas, regarding the deposit of the ship's papers, must be limited to the case of entry, drawing after it clearance, as laid down in the opinions of my predecessors, and of the Supreme Court of the United States.

I am, very respectfully,

C. CUSHING.

Hon. WM. L. MARCY,
Secretary of State.

SALARY OF CHIEF OF NAVAL BUREAU OF CONSTRUCTION.

The salary of the Chief of the Bureau of Construction in the Navy Department as such is three thousand dollars, though three thousand five hundred dollars is allowable to a Captain of the Navy when he holds the office, the latter sum being provided in this case only as a limitation of his pay in the Navy.

ATTORNEY GENERAL'S OFFICE,
October 18, 1853.

SIR: I have considered the question presented by your communication of the 24th September.

By "An act to reorganize the Navy Department of the United States," approved 31st August, 1842, (v Stat. at Large, by Little & B., p. 579, ch. 286, sec. 3,) the President of the United States was authorized "to appoint, by and with the ad-

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vice and consent of the Senate, * * * a Chief of the Bureau of Construction, Equipment, and Repairs, who shall be a skilful naval constructor, and shall also appoint a Chief of the Bureau of Provisions and Clothing, who shall each receive for his services three thousand dollars per annum."

An act making appropriations for the civil and diplomatic expenses of Government for the year ending 30th June, 1849, and for other purposes, approved 12th August, 1848, (ix Stat. at Large, p. 290, ch. 166,) appropriated, "For compensation of the Chief of the Bureau of Construction, Equipment, and Repairs, and of the assistant constructor, draughtsman, clerks and messenger in his office, \$13,100: Provided, That when a captain in the Navy shall be the Chief of the Bureau, he shall receive the same pay to which he would be entitled if upon other duty."

After this proviso, a captain in the Navy was appointed Chief of the Bureau of Construction, Equipment, and Repairs, and the estimates for the support of the Navy Department included the salary of the captain of the Navy and Chief of the Bureau of Construction, Equipment and Repairs, at the pay of a captain in the Navy upon duty, at \$3500 per annum. Such estimates were followed by corresponding appropriations, and so have continued.

But in the act making appropriations for the civil and diplomatic expenses of the Government for the fiscal year ending the 30th June, 1852, approved 3d March, 1853, (Session Acts, by Little & B., p. 196, ch. 97,) it is provided, "For compensation of the Chief of the Bureau of Construction, Equipment, and Repairs, and the clerks, draughtsman, and messenger in his office, \$13,600: Provided, That the Chief of the Bureau be a skilful naval constructor, as required by the act approved August 31st, 1842, instead of a captain in the Navy."

Upon these acts of Congress, the question is,—What is the salary of the Chief of the Bureau of Construction to be, whether three thousand five hundred or three thousand dollars?

The appropriation of the act of 1853 is, in gross, so much for the Chief, clerks, draughtsman and messenger, without prescribing how much is to be paid to each, which depends on other laws

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regulating the number and the salaries of the officers in question. An appropriation may be for a less amount than the lawful salaries of the parties, in which case there is a deficiency of appropriation to be supplied otherwise; or the appropriation may be too much, and then a surplus of appropriation exists to be disposed of according to law. That is, the appropriation in gross, of so much for the salaries of the officers of a department or bureau does not by any means operate, *ex vi termini*, as a definition of the rate of each or any of the salaries.

Suppose the case of an excess of an appropriation comprehending the salaries of a class of officers, which salaries are otherwise prescribed by law. That surplus can no more be claimed by the chief of the department or bureau in question as augmentation of his salary, than by any one of his subordinates.

In truth, it is neither to be given to any one, nor to be divided among all, but is to fall back as a surplus appropriation, just as in the case of a vacancy in a given office for which appropriation may have been made, and by reason of which vacancy an unexpended balance remains in the Treasury.

The proviso in the act of 1848 did not increase the salary of the Chief of the Bureau of Construction as such; it only permitted a captain of the Navy, if appointed Chief of the Bureau, to enjoy his compensation as captain of the Navy "as if upon other duty," instead of being reduced to the salary fixed by law for the Chief of the Bureau as such.

The act of March 3d, 1853, which requires that the Chief of the Bureau shall be a "naval constructor," is incompatible with the proviso of the act of August 12th, 1848, and being posterior in point of time, is therefore a repeal of the proviso. And although the Department made estimates for the salary of the Chief of the Bureau as if to be a captain in the Navy, and those estimates were passed into an appropriation, still this cannot control the subsequent statute, which, in restoring the office of the Chief of the Bureau of Construction as a separate office, restored the specific salary of that Chief.

I am of opinion, therefore, that the compensation of the Chief of the Bureau must be three thousand dollars, according

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to the act of August 31st, 1842, which created the office and fixed the salary of the officer.

I am, very respectfully, your obedient servant,

C. CUSHING.

Hon. JAS. C. DOBBIN,

Secretary of the Navy.

WAUKEGAN BREAKWATER.—HARBOR IMPROVEMENT.—PURPRESTURE.

The right and title to the lake-shore of the great Lakes is in the several States, not in the United States.

In general, breakwaters and other harbor improvements constructed by the United States, of late years, have been constructed without purchase of land and cession of jurisdiction from the several States in which the works are placed, and the land under them belongs to the respective States.

Lawful authority exists for the protection of the works thus constructed, from pillage or appropriation by individuals or corporations.

Obstructions to navigation in the navigable waters of the United States, whether by States or by individuals, constitute acts of purpresture.

There is remedy in such case by *ex officio* information in the name of the Attorney General of the United States.

ATTORNEY GENERAL'S OFFICE,

October 19, 1853.

SIR: It appears by your letter of the 21st of September last, enclosing a communication to you from Colonel Abert, of the corps of Topographical Engineers, that it is proposed to take legal measures to restrain any person from placing a bridge, pile, or other obstruction nearer than within a certain prescribed distance from the breakwater, now in the course of construction on the shore of Lake Michigan, at Waukegan, in the State of Illinois, to the end that a good ship channel may be maintained free and unobstructed under the lee of said breakwater; and my opinion is requested in the premises.

Whether the United States have any right of process in the case, and if so what, depends in part on the question, which presents itself *in limine*,—In whom are the right and title to the lake-shore, and to the soil covered by the water of Lake Michigan, at Waukegan, in the State of Illinois?

I conceive this point to be thoroughly settled, as well by the

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general theory of the Federal Government as by the adjudications of the Supreme Court, and the whole tenor of the legislation of Congress.

In the case of *Pollard's Lessee v. Hagan*, (iii Howard, 212,) the Supreme Court came to the following conclusions, namely:

"First, the shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the States respectively."

"Secondly, the new States have the same rights, sovereignty, and jurisdiction over this subject as the original States."

The doctrine of this case has been considered, and affirmed and reaffirmed, in the subsequent cases of *Goodtitle on the demise of Pollard's Heirs v. Kibbe*, (ix Howard, 477,) and of *Doe on the demise of Executors of Kennedy v. Beebee* and others, (xiii Howard, 25,) and must be taken to be the law of the land.

The principle extends in fact to the whole body of any navigable water in the United States and the soil under it. Thus, in the case of *Rundle et al. v. Delaware and Raritan Canal Company*, (xiv. Howard, p. 80-90,) the court say, in regard to the river Delaware, that "Below tide-water, the river, its soil and islands, formerly belonged to the crown; above tide-water, it was vested in the proprietaries of the conterminous provinces, each holding *ad flum aquæ*; since the Revolution, the States have succeeded to the public rights both of the crown and the proprietaries." Similar doctrine has been advanced by the Supreme Court in regard to the river *Chattahoochee*, for example, (*Howard et al. v. Ingersoll*, xiii Howard, p. 381,) and to the *Potomac*, (*Georgetown v. Alexandria Canal Company*, xii Peters, p. 91,) and to the river *Ohio*, (*Pennsylvania v. Wheeling Bridge*, xiii Howard, p. 519,) and to *Raritan Bay*, (*Martin et al. v. Waddell*, xvi Peters, 367,) and applies to all other navigable waters in the United States.

It is unnecessary here to trace the history of this doctrine as a principle of constitutional law, or to review the numerous decisions in the several States, in and by which it has been recognised on their part as an element of the fundamental law of the Federal Union. (See *Angell on Tide Waters*, ch. 2.) I content myself with showing *in extenso* the full recognition of the doctrine by the highest judicial authority of the United States.

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Observe, that in the leading case of *Pollard's Lessee v. Hagan*, affirmed and reaffirmed in the subsequent cases cited, the doctrine of the court is expressly applied to the territory ceded by Virginia to the United States, out of which the State of Illinois has been formed; and it extends therefore to the waters and to the submarine soil of Lake Michigan.

I proceed now to inquire how the question stands upon the acts of Congress pertinent to the subject.

The United States have no grant from the State of Illinois, nor any title under a grant of the State, for the submerged soil whereon the bridge piers in Lake Michigan have been erected, nor whereon to erect the contemplated breakwater in the lake.

It is impossible to admit that the United States may, by erecting bridge piers, or breakwaters, or other such like works, within the sovereignty and jurisdiction of a State, and without the consent of the State, thereby divest the right, title, and jurisdiction of the State, and appropriate and transfer the right of property and the sovereignty and jurisdiction over the soil and the works to the Government of the United States, any more than an individual could, by erecting a building on the soil of another without his consent, convert the soil, and the buildings on it, into the private estate, right, and title of such trespasser.

Neither the power of Congress to regulate commerce, nor its power to legislate in all cases whatsoever for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings, can operate to divest the States of their rights of soil and jurisdiction; the lands for all such purposes must, by the express words of the Constitution, be "purchased by the consent of the legislature of the State in which the same shall be." Thus, Castle Calhoun, at the Rip-Raps, was built on the soil of the submerged shoal, ceded to the United States by the State of Virginia. And Fortress Monroe, also, is built on a place ceded by the State of Virginia. By the law of the United States, approved 20th March, 1794, (1 Stat. at Large, p. 345, chap. ix.,) the President of the United States was authorized to fortify the ports and harbors therein mentioned, (to the number of twenty;) and it was made lawful for him to receive from any State a cession of the lands, or to purchase from individuals the lands on which any of the fortifications, with the

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necessary buildings, may be, or are intended to be, erected. This is inconsistent with the idea that the United States can, by erecting fortifications, or ports and harbors, convert the lands, whereon such needful buildings shall be erected, into the property and title of the United States, without cession or purchase from the State, or the individual therein who may be the rightful proprietor.

The first volume of Bioren and Duane's edition of the Laws of the United States, contains suggestive abstracts of the various cessions by States, and conveyances by individuals, at the date of that publication, made to the United States, of lands, and lots of ground, and soil above water, and of water-lots, flats, shoals, and rocks, under water, beaches, islands, and shoals, for navy-yards, custom houses, forts, arsenals, and other public purposes.

By an act, approved 23d June, 1797, (i Stat. at Large, chap. 3, sec. 3,) the several States, who were found indebted to the United States, on the settlements made between the United States and the several States by the commissioners for that purpose appointed, were authorized to expend "the sums respectively due from them in fortifying their ports and harbors, and the sums so expended shall be passed to the credit of said States, * * * Provided said States shall and do cede to the United States the lands or places, on which such fortifications shall be so erected, in cases where the lands are the property of such States." This proviso was repealed by act of 3d May, 1798, (i Stat. at Large, p. 354-355, chap. 38, sec. 3.) These respective acts acknowledge that the ports and harbors in the United States belong to the States respectively, within whose territorial limits and jurisdiction they are situated.

By the 7th section of an act, approved 1 May, 1820, (iii Stat. at Large, p. 568, chap. 62,) it is enacted that "No land shall be purchased on account of the United States, except under a law authorizing such purchase."

The joint resolution of 11th September, 1841, (v Stat. at Large, p. 468, Resolution No. 6,) provides that "No public money shall be expended upon any site of land hereafter to be purchased by the United States for the purposes aforesaid," (viz.: for "armories, arsenals, forts, fortifications, navy-yards,

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custom houses, lighthouses, or other public buildings, of any kind whatever,") "until the written opinion of the Attorney General shall be had in favor of the validity of the title, and also the consent of the legislature of the State, in which the land or site may be, shall be given to said purchase."

These acts negative any idea that Congress claims power to take to the Government of the United States dry lands, or soil covered by water, for the purposes of commerce or navigation, or naval or military purposes, or for construction of any kind of public buildings, or public improvements, without a cession from the State, or a purchase from an individual who may have title to the property desired for the site of the public works intended by the United States.

Multifarious appropriations have been made for erecting breakwaters, piers, and so forth, for improvement of harbors and safety of navigation. But when so erected, Congress has not claimed any municipal government over them, has passed no law to punish any disturber of such public works so erected within the territorial limits and unyielded jurisdiction of any State, and has apparently left all such works to the protection of such several and respective States.

All the acts of Congress before cited seem to be in perfect concurrence with the principles adjudged by the Supreme Court of the United States.

As to the application of the rule to the State of Illinois: By the 9th section of the act of 18th May, 1796, "providing for the sale of the lands of the United States in the territory north-west of the river Ohio, and above the mouth of the Kentucky River," (i Stat. at Large, p. 468, chap. 29,) it is enacted "That all navigable rivers within the territory to be disposed of by this act, shall be deemed to be, and remain public highways: And in all cases where the opposite banks of any stream not navigable, shall belong to different persons, the stream and the bed thereof shall become common to both."

In the act of June 1st, 1796, (i Stat. at Large, p. 491, chap. 46, sect. 6,) there is the same provision; and by the act approved 26th March, 1804, entitled "An act making provision for the disposal of the public lands in the Indiana Territory, and for other purposes," (ii Stat. at Large, pp. 279-280, sect. 5-6,) the

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lands in Indiana were by section 5th ordered to be sold, "on the same terms and conditions as are or may be provided by law for the sale of the lands of the United States north of the Ohio river, and above the mouth of the Kentucky river." Section 6: "That all the navigable rivers, creeks, and waters within the Indiana Territory shall be deemed to be and remain public highways."

By act of 3d February, 1809, (ii Stat. at Large, p. 514, chap. 13), the Territory of Indiana was divided into two separate governments, and the territory lying west of the Wabash river and a direct line therefrom, and from Post Vincennes, due north to the territorial line between the United States and Canada, was called Illinois. The lands within this territory, however, were sold out under the statutes before mentioned, without changing the conditions, "that all the navigable rivers, creeks, and waters within the Territory should be and remain public highways," so that no individual could acquire a private right in any of them either at the public or at the private sales. Therefore, when the State of Illinois was admitted into the Union, "the shores of the navigable waters and the soils under them," within the State, became of the property, domain, and jurisdiction of that State, according to the decisions before cited.

The United States have no cession from Illinois of those navigable waters, nor of the soils under them, nor of the water of Lake Michigan, nor the soil under it, within the State of Illinois, upon which the bridge piers are built, nor of the submerged soil upon which the breakwater is to be erected at Waukegan.

The conclusion is irresistible that the rights of the United States, in the premises, and the remedy, if any, for the contemplated obstructions of the navigability of the waters of Lake Michigan at Waukegan, must be placed on some ground independent of that of title to soil, or of jurisdiction and domain, which certainly continue in the State of Illinois.

It is not to be doubted, therefore, that the State of Illinois, having the property in the shore and soil covered by the water of the lake, may, at her pleasure, abate any nuisance created on said shore or soil within her jurisdiction. It would be a purpresture, an encroachment on, or usurpation of, her sovereign rights, which she may render punishable by indictment, or may remove or reseize to the public use, in the discretion of her legis-

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lature, and of her supreme will as a State. (ii Coke's Inst. p. 38, ch. 23, and p. 272, ch. 4; i Hawkins P. C. p. 360; Angell on Tide Water, ch. 7; Woolrych on Waters, p. 196.)

But suppose the State refuses or neglects to demolish a structure erected, or to prevent one about to be erected, or should license the erection of a structure, in the navigable waters of the lake within her territorial limits, by which erection a purpresture shall exist, that is, the making of that several and private, which ought of right to be common to many, and the navigation shall thus be hindered, vessels endangered, and a channel or harbor made liable to damage by obstruction or deviation of currents and accumulation of mud:—Is there not a remedy?

I think there is, and a sufficient one, in the conservative power of the United States.

The navigable waters within the State of Illinois (or within any other State) are public highways, free and common, by constitutional right, to the use of all the citizens of the several States, equally and as fully as to the use of the State of Illinois, and to be guarded and protected as such by the Government of the United States for the benefit of the whole Union.

This power of conservation is perfectly distinct from the right of property and of ordinary jurisdiction in the shores of navigable waters and the soil under such waters. The sovereign may grant to individuals the right of property in the soil between high and low water mark, or below the latter; notwithstanding which *jus privatum* so granted by the sovereign, there will remain a *jus publicum* of passage and repassage, with consequent power of conservation in the sovereign.

"When," says Sir Matthew Hale, "a port is fixed, though the soil and franchise or dominion thereof, *prima facie*, may be in the king or by derivation in a subject, yet that *jus privatum* is burthened and superinduced with a *jus publicum* wherein nations and foreigners in peace with this kingdom, are interested by reason of common commerce, trade, and intercourse. They ought to be preserved from impediments and nuisances, which may hinder and annoy the access, or abode, or recess of ships and vessels and seamen, or the unlading or relading of goods." (De Port. Maris, pt. 2, chap. 17.)

Here we see distinctly the right of conservation separated

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from property in the soil, and also from the franchise and dominion thereof; and a grant of the latter does not authorize the erection of that, whereby the grantee shall make several to himself what ought of right to be common to all the inhabitants of the country, and to foreigners in amity with it. (Com. Dig. Prerog. D 7.) That is to say, there is a right independent of the *jus privatum* in the soil or dominion, namely, the right of passage, which is not subject to alienation, and prevails against any adverse claim. (Hale de Jure Maris, 12); in view of which we may further distinguish and say that usurpation of the *jus privatum* of the sovereign in ports or navigable waters is purpresture, while invasion of the *jus publicum* of navigation is a nuisance. (Glanville, bk. ix. c. 11; Spelm. Gloss. Purpresture.)

This doctrine is further explained in the legal authorities as follows:

“The right in ports is threefold:—The *jus privatum*, or the interest of propriety and franchise; the *jus publicum*, or the common interest that all have to have resort to and from public ports, as public sea marts or markets, with their goods, wares, and merchandise; the *jus regium*, or the right of superintendency and prerogative, which the king hath for the safety of the realm, or the benefit of commerce, or security of his customs.” (Hale de Port. Maris, ch. 6; Bacon’s Abr. Prerog. (B) Ports, &c.)

These doctrines of the common law are perfectly applicable in the United States, to the effect that, while, as in the present case, the soil and immediate jurisdiction, the *jus privatum* and *jus publicum*, of the harbor of Waukegan, are vested in the State of Illinois, yet the *jus regium*, or, as in the comprehensive and proper language of the civilians of Europe it is termed, the *jus majesticum*, the power to protect against foreign enemies or against individual usurpation, still resides in the Federal Government.

The powers, delegated by the Constitution of the United States to the Government of the Union, “to regulate commerce with foreign nations, and among the several States,” and “to lay and collect taxes, duties, imposts, and excises,” include the power to establish ports of entry and delivery, and, of necessary consequence, also the power to preserve those ports from all nuisances, which may hinder or annoy the access or recess of ships

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and seamen to and from the same, or the unlading and relading of goods there. But it is not in the power of a single State to establish ports of entry and delivery within its navigable waters, notwithstanding the rights of property and jurisdiction in the shores and beds of navigable waters vested in such State; that is a *jus majestaticum*, involved in the power of regulating commerce and raising revenue vested in the United States.

Such is the doctrine of the Supreme Court of the United States in the leading case of *Gibbons v. Ogden*, (ix Wheaton 1,) in which case the State of New York, undoubted proprietor of the shores and beds of the navigable waters within the State, granted to R. R. Livingston and Robert Fulton the exclusive right of navigation of all the waters within the jurisdiction of that State, with boats moved by fire or steam, for a term of years, of which Ogden was the assignee. By a decree in chancery at the suit of Ogden *v.* Gibbons, the validity of that exclusive right was affirmed; upon appeal to the highest court of the State of New York, the decree of the Chancellor was affirmed; upon appeal to the Supreme Court of the United States, that decision was reversed. The grant of the exclusive navigation was in violation of the Constitution of the United States, in violation of the superintending and conservative power of the Government of the United States over commerce and navigation delegated by the Constitution. The Government of the United States did not claim, nor did the respondent Gibbons claim for the United States, any property in the shores, or the soil under the navigable waters, of New York; but the conservative power of the United States over commerce and navigation was invoked. That power removed the obstructions to commerce and navigation growing out of the purpresture granted by New York, and the retaliatory acts passed by the legislatures of New Jersey and Connecticut.

All the reasoning and the final decree in this case establish the principle that the several States hold their property and dominion in the shores and beds of the navigable waters within their respective boundaries, subject to the general rights of commerce and navigation, to the rights of ingress and egress, access and recess, for the lawful purposes of commerce and navigation, which belong to all the citizens of the United States, as well as

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to foreigners in amity with the United States, which rights of commerce and navigation the several States cannot hinder, obstruct, or take away by legislation; for, even in the case of concurrent powers, the law of a State must yield to a law of the United States.

This doctrine is reaffirmed in the case of *The United States v. Coombs*, (xii Peters, 72,) and in the still more important one of *The State of Pennsylvania v. The Wheeling Bridge*, (xiii Howard, 318.)

It is further observable, in this part of the subject, that the power to regulate the use of the shores and beds of navigable waters, so that the lawful purposes of commerce and navigation shall not be hindered, is quite distinct from the right of eminent domain. The former leaves to the proprietor the possession and general use of his property, restrained only by the maxim, "*sic utere tuo ut alienum non lædas*;" but the latter divests the proprietary, and converts the property to public domain and public use, as explained in an important case hereinafter more fully exhibited. (*Comth. v. Alger*, vii Cush. 53.) So that, where individuals hold a fee simple in the soil to low water mark, or below where the tide ebbs and flows, or *ad medium filum aquæ* in fresh water rivers, such title in fee is nevertheless holden in subordination to the general rights of free passage for the lawful objects of navigation and commerce.

Assuming, then, that a power exists in the Federal Government, a *jus majestaticum*,—for the conservation of the public rights of navigation and commerce, we come now to the question in what way that power is to be exerted by law.

Congress unquestionably has the power to declare the obstructions of navigable waters an offence against the United States. This point must be taken as fixed so far as regards the opinion of the Supreme Court of the United States. (See *State of Pennsylvania v. Wheeling Bridge*, xiii Howard, 581, per Ch. J. Taney. Also *Wilson and Others v. The Blackbird Creek, Marsh. Co.*, ii Peters, 252, per Ch. J. Marshall.) But Congress has not as yet done this; and, although the position was a doubtful one at first, (see *United States v. Hudson*, vii Cranch, 32; *United States v. Coolidge and Others*, i Wheaton, 415,) still it must be now received as the settled doctrine, that "The legis-

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lative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court which shall have jurisdiction of the offence," before it can be the subject of indictment in the courts of the United States. And the general doctrine as laid down in the cases above cited has been specially applied to the present subject in a later case, where the Supreme Court say that "An indictment at common law would not be maintained in the courts of the United States," (for a nuisance in a navigable water,) "as no such procedure has been authorized by Congress." (*State of Pennsylvania v. Wheeling Bridge*, xiii Howard, 518, 564.)

Although Congress may not have yet fully exercised this power, so as to declare what in all cases is a nuisance, yet it has in a signal case exercised this power for an opposite purpose, namely, to declare what is not a nuisance, by enacting that the bridge, the subject of litigation in the case above cited, is a "lawful structure," and that it "shall be so taken and held to be, anything, or any law or laws of the United States, to the contrary notwithstanding." (Act of August 31, 1852, sec. 6, Sess. Acts, p. 112.)

But, from the fact that nuisances to navigable waters are not indictable in the courts of the United States, does it follow that no legal means now exist, by which the Federal Government may assert its conservative power in regard to such navigable waters? It would be strange if it were so; for, when we look at the vast number of appropriations made by the United States for sea-walls, breakwaters, deepening the channels of rivers and harbors, blowing out rocks, removing natural obstructions therefrom by dredges, snag-boats, or otherwise preserving the same, and the islands therein, and placing piers, buoys, and light-boats by the shoals, narrows, and difficult passages of navigable rivers and harbors, since the commencement of the Government, we shall be deeply impressed with the magnitude and importance of the public interests involved in the question of the conservation of such works against purprestures, depredations, thefts, and trespasses, converting to the ends of private gain or destructive malice, that which is or ought to be for the common public good of every citizen of the United States. In fact, the equity powers of the Supreme Court afford the means of meeting the grievance.

Nothing is better settled in England than the doctrine that a court of chancery has authority in that country to restrain or abate a purpresture or nuisance in a harbor or other navigable waters, on information by the Attorney General. The cases are numerous, (*e. g.* Attorney General *v.* Richards, ii Anstruther, 603; Attorney General *v.* Johnson, ii Wilson's Ch. Ca. 87,) in which, on proper process, a court of chancery has acted in this matter. In one of the above cases, the defendants having erected a wharf, two docks, and other buildings between high and low water mark, in the harbor of Portsmouth adjoining Gosport, so as to prevent vessels from mooring there, or sailing over the spot, and also to endanger further damage to the harbor by obstructing the free current of the water to carry off the mud, a decree was entered to abate the nuisance upon information filed by the Attorney General on the equity side of the Court of Exchequer. In another case the Lord Chancellor, upon similar information by the Attorney General, and a bill for perpetual injunction, restrained the defendants from choking the bed of the Thames at Milbank. (See Woolrych on Waters, p. 214; Angell on Tide Waters, ch. 7.)

Now, in signally decisive cases, the Supreme Court of the United States has adopted the doctrine of chancery in this matter.

The city of Georgetown filed a bill in the Circuit Court of the District, praying for an injunction to prevent the Alexandria Canal Company from obstructing the navigation of the river Potomac. On appeal to the Supreme Court, it was adjudged that the injunction did not lie in this case at the prayer of these plaintiffs, and under the particular circumstances of the case, but that, the question being of a nuisance by the obstruction of a navigable river, in general derogation of the public rights, the true remedy was by information in the name of the Attorney General. (*City of Georgetown v. Alexandria Canal Company*, xii Peters, 91.)

In the case of *The State of Pennsylvania v. The Wheeling Bridge*, the nuisance complained of was the construction of a bridge over the river Ohio, by authority of the State of Virginia. A majority of the court were of opinion that the nuisance was abateable in this process, that is, at the relation of the State of

Pennsylvania. Chief Justice Taney, while dissenting from the majority as to the question of the competency of the proceedings, admitted, in an opinion which constitutes a model of judicial reasoning, the power of the court to abate a proved nuisance of this character, upon an information in chancery in the name of the Attorney General. (xiii Howard, p. 518-590.)

I take it as the undeniable law of the land, therefore, that the Attorney General of the United States has authority, when occasion requires the abatement of a public nuisance to navigable waters, to file an information therefor and a bill for injunction, in a proper court of the United States.

But this remedy, as already intimated, is not exclusive. Each State has also the power to conserve the navigable waters within its jurisdiction by suitable process known to its laws. The United States may construct works for the improvement or security of a given harbor, or as a shelter for ships from storms, or in time of war; and they may interpose for the conservation of said works, or to guard against any diminution of the existing advantages of a river, lake, or sea by the usurpation of individuals, or even of a sovereign State of the Union. But so, also, in my judgment, may that State itself. There is nothing in the letter of the Constitution or the spirit of the Government to forbid the State of Illinois or the State of New York from improving a natural harbor within its limits, blowing away rocks which impede a channel, dredging out a river, constructing piers, docks, breakwaters, beacons, and sea-walls, or by indictment or other process protecting the rights of riparian proprietors, or of the public at large in its navigable waters. But the United States have a concurrent jurisdiction for any of these objects, and a jurisdiction, which, in case of conflict, is paramount and exhaustive of the whole subject-matter; for otherwise a given State might do that, which, while actually or in supposition beneficial to itself, would be injurious to some other State, or to the citizens of the United States in general, or to the subjects of other governments in amity with the United States.

I had special occasion to reflect on this whole question, in all its legal relations, while participating, on the bench of the Supreme Court of Massachusetts, in the decision of a case, which affords an apt illustration of the power in the premises,

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which any one State of the Union possesses; namely, the case of the Commonwealth *v. Alger*, (*Ut supra*. Also, Massachusetts Senate Documents, 1853, No. 109.) For the protection of the harbor of Boston against injury by purpresture or nuisance, the Commonwealth of Massachusetts established by law a line along the shore of said harbor, beyond which all constructions were forbidden. The defendant being a riparian proprietor, and by the ancient law of that State owning as such in fee the flats, on which the sea ebbs and flows, adjoining his upland to a distance from the high water mark of not exceeding one hundred rods, had constructed a wharf wholly on the flats thus owned by himself in fee, but extending thereon to a distance seaward beyond the line prescribed by the Commonwealth. For this act he was indicted, and the indictment was maintained, and the constitutionality of the prohibition affirmed by the unanimous opinion of the Supreme Court.

In this, there is nothing inconsistent with the power in the premises, which appertains to the United States. As the property in the shores and beds of the navigable waters, within the limits of the several States, belongs to them respectively, so the rents, issues, and profits arising from wharves, docks, or other structures, erected for the facilities of navigation and commerce, belong to them, and not to the United States. Moreover, the given State itself is primarily, and to a superior degree, interested in the conservation of its navigable waters, which are among the elements of its particular prosperity and greatness. A nuisance to such waters is, therefore, generally speaking, of special injury to the particular State in which they lie. It has, therefore, its own power in the premises to vindicate its rights of property and of navigation against purpresture or nuisance. I do not speak now of the power of a State to regulate its internal commerce, as in the matter of inspection laws, health laws, roads, ferries, and the like, whether exclusively, or in concurrence with the United States, (see *Gibbons v. Ogden*, ix Wheaton, 1; *Brown v. Maryland*, xii Wheaton, 419; *City of New York v. Milne*, xi Peters, 102; *Thurlow v. Com. of Massachusetts*, v Howard, 504; *Smith v. Turner*, vii Howard, 283;) nor do I speak of the power of a State over a navigable river wholly within its own jurisdiction, the improvement thereof, or the

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privileged navigation of the same, (see *Veazie et al. v. Moore*, xiv Howard, 568;) but I refer to the external waters of a State, its lake or sea harbors, or its rivers common to it and to other riparian States; in all which, as I conceive, a power both of improvement and of conservation resides in the particular State. But this power is in concurrence with, and in subordination to, the supreme *jus majesticum* vested in the United States, who alone have power to prevent one State from exerting its power in this respect to the prejudice of another State.

In these relations, the powers of the States, and those of the United States, although acting on the same nuisance, and at one and the same time, would be auxiliary one to the other, and, if honestly and frankly exercised, involving no conflict or collision of authority.

It is no objection to this view of the subject, namely, the assumed existence of distinct substantive powers in a State and in the United States, that, in the exercise of them for their respective purposes and ends, they may bear upon the same person or subject at the same time. For instance, the direct taxes imposed by a State, and those imposed by the United States, have, at times, been simultaneously in operation as to the same tracts of land: yet no serious collision between the two authorities ensued. The constitutional doctrine,—that the concurrent powers of the State and Federal Governments must be exercised by the former in subordination to the latter,—and that in case of collision, the authority of the United States is the superior, and supreme,—is calculated to prevent any such conflict, or to provide for it when it occurs.

Nor is it an objection to the legislation of a State, that it has a tendency to aid incidentally the execution of the laws and policy of the United States. Thus, a law of the State of Pennsylvania, inflicting a penalty on a militia-man called into the service of the United States, for disobeying that call, has been adjudged to be valid. (*Houston v. Moore*, v Wheaton, 1.) So of a law of the State of Illinois for the delivering up of persons bound to labor in another State and escaping into Illinois. (*Moore v. The State of Illinois*, xiv Howard, 13.) In each of these cases the law of the State was held to be good, as auxiliary and ancillary to that of the United States. The citizens of each

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State owe allegiance to that State, and obedience to the powers thereof; and at the same time they owe allegiance to the United States, and obedience to the powers thereof; and of course, the same act of a citizen may be contrary to his allegiance and duty, as well to his particular State, as to the United States.

Upon the whole matter my opinion is, then, that in case of a nuisance erected or about to be erected in the harbor of Waukegan, in the State of Illinois, and the facts being such as to call for the intervention of the Federal Government, it would be lawful and proper, in order to abate such nuisance, or to prevent, enjoin, and inhibit the same, for the Attorney General to file an information in chancery before the competent court of the United States.

I am, very respectfully, your obedient servant,

C. CUSHING.

Hon. JEFFERSON DAVIS,
Secretary of War.

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Soldiers, who re-enlist in the Army within two months before, or one month after, the expiration of the term, are entitled to the bounty provided by the act of July 5th, 1838, and also to that provided by the act of June 27th, 1850, where the re-enlistment takes place in the vicinity of the military posts on the western frontier and at remote stations.

ATTORNEY GENERAL'S OFFICE,

October 25, 1853.

SIR: I have considered the question presented to me by your communication of the 26th September, and submit herewith my views in relation thereto.

The inquiry involves the construction of the two following acts of Congress, namely:

First. "An act to increase the military establishment of the United States, and for other purposes, approved July 5th, 1838. (v Stat. at Large, p. 286.)

Sect. 1 provides * * * That "there shall be added to each of the five regiments of artillery one company; * * that there be added to every company of artillery, sixteen privates, and to every company of infantry, one sergeant and thirty-eight pri-

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vates; ***** and that there be raised and organized *** one regiment of infantry," &c.

Other sections add many commissioned officers of the grades of lieutenant colonels, majors, captains, and first and second lieutenants; and make general regulations respecting the staff, the quartermaster's, the commissary's, and pay departments.

Sect. 16 provides that, "from and after the passing of this act, all enlistments in the army of the United States shall be for five years."

This section also increased the monthly pay of non-commissioned officers, musicians, and privates; and directed that "two dollars per month of said pay be retained until the expiration of his term of service."

Sect. 29 enacts that "in lieu of the bounty now provided by law for re-enlistment, every able-bodied non-commissioned officer, musician, or private soldier, who may re-enlist into his company or regiment within two months before or one month after the expiration of his term of service, shall receive three months' extra pay; and any non-commissioned officer or soldier, who shall have served ten consecutive years, and shall obtain *** a certificate that he had faithfully performed his duty, *** shall be allowed one hundred and sixty acres of land, to be designated, surveyed, and laid off at public expense," &c.

This section gives three months' extra pay; and that increased pay is instead of two months' extra pay for re-enlisting as allowed by the 3d and 4th sections of the act of 2d March, 1833. (iv Stat. at Large, p. 647, chap. 68.)

Secondly. "An act to increase the rank and file of the Army, and to encourage enlistments," approved 17th June, 1850. (ix Stat. at Large, p. 438.)

Sect. 1. *** "Hereafter, each company of artillery, designated and serving as light artillery, shall, during such service, consist of the commissioned officers, as now provided by law, and of four sergeants, four corporals, two artificers, two musicians, and sixty-four privates. (Being an increase of twenty-two privates to each company.) See act of 23d August, 1842. (v Stat. at Large, p. 512.)

Sect. 2. "The President of the United States is hereby authorized, by voluntary enlistment, to increase the number of

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privates in each or any of the companies of the existing regiments of the Army, at present serving, or which may hereafter serve, at the several military posts on the western frontier, and at remote and distant stations, to any number not exceeding seventy-four," (being an increase of thirty-two privates to each company of artillery or infantry, and of twenty-five privates to each company of dragoons, above the number fixed by the act of 23d August, 1842,) Provided that the said enlistments shall be for the term of five years."

Sect. 3 enacts, "that, whenever enlistments are made at, or in the vicinity of, the said military posts and remote and distant stations, a bounty, equal in amount to the cost of transporting and subsisting a soldier from the principal recruiting depot in the harbor of New York to the place of such enlistment, be and the same is hereby allowed to each recruit so enlisted, to be paid in unequal instalments at the end of each year's service, so that the several amounts shall annually increase, and the largest be paid at the expiration of each enlistment."

An order of the War Department of the 22d of June, 1850, promulgating to the Army the act of the 27th of June, 1850, construes it, in relation to that of the 5th of July, 1838, as follows:

"In cases of re-enlistment, the soldier will receive either the bounty provided by this act, or by that of July 5th, 1838, at his option."

The Adjutant General, under date of the 23d of July, 1853, expresses the opinion that a soldier, who re-enlists into the Army, within two months before, or one month after, the expiration of his term of service, and so re-enlists at, or in the vicinity of, the military posts of the United States on the western frontier, and at remote stations, is entitled to both the bounties, that of the act of 1838, and that of the act of 1850, in which you yourself incline to concur.

The Second Comptroller, after examining the subject, has come to the conclusion that the re-enlisted soldier is not entitled to both bounties, but may elect between them, or, not electing, is confined to that of the earlier act of Congress.

I am of opinion with the Adjutant General that, the bounties being separate, and on separate conditions; the soldier, whose

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case of enlistment comes within both conditions, is entitled to both bounties.

Enlistments into the Army, made under the inducements held out by the laws of the United States, are contracts; and, although the Government be a party, still the contracts "ought to be construed according to those well-established principles which regulate contracts generally." (*Huidekoper's Lessee v. Douglass*, iii Cranch, p. 70.)

In the 29th section of the act of July 8th, 1838, there is a condition, which, if performed, entitles the performer to the recompense promised by the Government. In the 3d section of the act of June 17th, 1850, there is another and a distinct condition, which, if performed, entitles the performer to a recompense different from the former one. If the soldier have performed both conditions, and the Government received the benefits of both, then, as I conceive, reason, justice, and the established principles of law regulating contracts generally, oblige the Government to allow him both recompenses.

I should have deemed this brief statement of the facts, and of the correspondent legal doctrine, a sufficient answer to your inquiry, but for the consideration that a former Secretary (Mr. Crawford) and the Second Comptroller have come to other and variant conclusions:—out of deference to whose opinions I proceeded to a more detailed exposition of the question.

I assume the following established maxims of the law as the *criteria* by which to determine the meaning of the two acts of Congress before me, namely:

1. In expounding a law, construction is to be made of all the parts together, and not of one part by itself. (*Lincoln College Case*, iii Coke 596; *Bacon's Abr. Stat. I. v. 2, ex. 7-8.*) For we may often find out the sense of one clause by the words or intent of another clause. (*Stowell v. Douch*, Plowd. 365.)

2. If divers statutes relate to the same thing, they ought all to be considered in construing any one of them; for, though made at different times, or not referring to each other, or in part repealed or obsolete, yet being in *pari materia*, they may be explanatory, one of the other. (*Rex v. Loxdale and others*, i Burr. 447, *Bacon's Abr. Stat. rule 3.*)

3. The intention of the law is to be taken into view, and such

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a construction be given, if possible, as may best answer the ascertained purpose of the lawmaker. (Bacon's Abr. Stat. rule 8.) All sound statutory exposition looks to the particular intent of the statute. (Willion v. Berkley, Plowd. 223.) That intent, if intelligibly expressed in the text, is the meaning of the law, (Stowell v. Lord Zouch, Plowd. 366,) and is to be gathered sometimes from the act itself, sometimes from extraneous circumstances, (Stradling v. Morgan, Plowd. 205;) which is illustrated in the legal authorities at the foundation of the common law, in their speaking of the letter of the law as the shell and the meaning as the kernel, one the body and the other the soul, *quia ratio legis est anima legis*. (Eyston v. Studd, Plowd. 465.)

4. Statutes, which concern the public good in a remedial, as distinguished from a penal, sense, as laws for the advancement of learning, the support of the poor, the safeguard of political institutions, the protection and security of life and property, and the like, are to be construed in the sense of enabling rather than disabling, and in such wise as to attain the proposed end. (Bacon's Abr. Stat. rule 7-8; Heydon's Case, iii Coke, 7 b.)

Bearing these rules of construction along with us, let us now consider the arguments by which the soldier re-enlisting, unless he make an election, is confined to the earlier, and deprived of the later, bounty.

It is objected, in the first place, that the provision of the act of 1852 applies in terms only to "the enlistment of *recruits*, not to the re-enlistment of *soldiers*," assuming that a re-enlisted soldier is not in legal meaning a recruit.

To the contrary of this, is the military system of the United States. "To recruit" means to enlist soldiers; and "a recruit" is an enlisted soldier; as appears by the following statutes, namely:

1. The act of 29th January, 1813, (ii Stat. at Large, p. 795, chap. 16,) in section 7, provided "That the commissioned officers, who shall be employed in recruiting, * * * * * shall be entitled to receive for every person enlisted by them into the service for the time specified, * * * * * and between the ages of eighteen and forty-five, the sum of two dollars. Provided, nevertheless, that this regulation, so far as respects the age of

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the recruit, shall not extend to musicians, or to those soldiers, who may re-enlist into the service."

Sect. 8. "That there shall be allowed and paid to each man, recruited as aforesaid, a bounty of sixteen dollars."

These two sections use the participles "recruiting" and "recruited," and the substantive "recruit," as comprehending, as well a soldier re-enlisted into the service, as a person enlisted who was not before in the service.

2. The first section of the act of 23d August, 1842, (v Stat. at Large, p. 542,) directed that each company of dragoons, artillery, and infantry, be reduced to the respective numbers therein mentioned, "And that no recruits shall be enlisted for the dragoons, artillery, or infantry, until the numbers in the several companies shall be reduced, by the expiration of the time of service, by discharge, or other causes, below the number herein fixed for the said companies, respectively: Provided, that nothing in this section shall be construed to prevent the re-enlistment of non-commissioned officers, whose terms of service may expire before the army shall be reduced to the numbers hereinbefore established."

The special exception, giving leave for the re-enlistment of non-commissioned officers, so introduced by the proviso, proves that their re-enlistment had been comprised in the previous prohibition, "that no recruits shall be enlisted" for the dragoons, artillery, or infantry, until, &c.

There is nothing in the etymology, definitions, or common use of the word "recruit," to contradict this view of the subject.

"Recruit" is derived from *recroître*, to regrow. The verb "recruit" is defined to mean "to grow again," to add again to the number or quantity, *to supply a loss or deficiency.*" The substantive "recruit" is defined, "a man enlisted *to increase the numbers left to or towards the original number.*"

These definitions are a confutation, in part, of the idea, that the word "increase," in the statutes, applies only to augmentation of the original number by new recruits, and excludes augmentation by re-enlistment, so as to add to the numbers left, by reason of the termination of the period of service; and they justify the parliamentary use of the word "recruit," in the statutes above cited.

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The limited construction of the acts of 1838 and 1850, assumed by Mr. Crawford, and by the Comptroller, counteracts a public policy, which has prevailed, for more than fifty years, in the military system of the United States, of giving a higher bounty to soldiers for re-enlisting, than to persons not before in the army for enlisting.

The fifth section of the act of 2d January, 1795, (i Stat. at Large, p. 409,) gave to each soldier, then in the service of the United States, or discharged therefrom, subsequent to the third day of March then last, who should re-enlist, an additional bounty of eight dollars,—making the entire bounty sixteen dollars; and to each person, not now in the army of the United States, or discharged as above, who shall enlist, an additional bounty of six dollars,—making the entire bounty of fourteen dollars.

By the 3d sect. of the act of 2d March, 1833, (iv Stat. at Large, p. 647,) “Every able-bodied musician or private soldier, who may re-enlist into his company or regiment, within two months before, or one month after, the expiration of his term of service, shall receive two months’ extra pay, besides the pay and other emoluments which may be due to him on account of the unexpired period of any enlistment,” and by sect. 4 “shall receive his full pay at the rate of six dollars per month, without any temporary deduction therefrom.”

Sect. 5. “No premium to officers for enlisting recruits, nor bounties to recruits for enlisting, shall be allowed after the passage of this act.”

Thus this act gives bounties to re-enlisting recruits, but no bounties to enlisting recruits.

The act of 5th July, 1838, (v Stat. at Large, p. 260,) gives a bounty of three months’ extra pay, in lieu of the former bounty for re-enlistment, to “every able-bodied non-commissioned officer, musician, or private soldier, who may re-enlist into his company or regiment within two months before, or one month after, the expiration of his time of service.”

Persons, not before in the Army, received under this statute no bounty for enlisting.

This proved policy of the Government, in holding out superior inducements for re-enlistments, is founded in obvious experience of the superior efficiency and general value of trained

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and veteran soldiers as compared with raw or undisciplined levies.

The limited construction of the act appears to be inconsistent with the reason of the statute of 1850, when well considered in all its parts.

The 2d section of this statute authorizes the President "by voluntary enlistment to increase the number of privates in each or any of the companies of the existing regiments of the Army, at present serving, or which may hereafter serve, at the several military posts on the western frontier, and at remote and distant stations, to any number not exceeding seventy-four."

The description of persons, whom the President may cause to be enlisted by virtue of this section, (in respect of age, height, and other qualifications,) must be determined by the pre-existing regulations.

According to those regulations, "every able-bodied non-commissioned officer, musician, or private soldier, may re-enlist into his company or regiment within two months before, or one month after, the expiration of his term of service." What is there in the act to justify a recruiting officer in refusing to take the voluntary enlistment of such a soldier? Such re-enlisting of recruits to fill vacancies existing, or to occur within two months, are, as we have seen, preferred in the military system of the United States, because veterans are more valuable than recruits who were not before in the service.

It is palpable that, under this second section of the act of 17th June, 1850, all re-enlistments of such non-commissioned officers and musicians and private soldiers, corresponding in other respects with the general regulations as to the qualifications of recruits, are comprehended under the phrase "voluntary enlistment," used in this second section. Enlistment is the *genus*, the major proposition. Re-enlistment is a *species*, the minor proposition, contained within the major. Recruit is a *genus*. A re-enlisted recruit is a *species*. It would be absurd to say that a re-enlistment is not enlistment.

As re-enlisted soldiers are comprehended in the second section, they cannot, by any fair construction, be excluded from the provisions of the third section.

That third section enacts "That whenever enlistments are

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made at, or in the vicinity of, the said military posts, and remote and distant stations, a bounty equal in amount to the cost of transporting and subsisting a soldier from the principal recruiting depot in the harbor of New York, to the place of such enlistment, be, and the same is hereby allowed to each recruit so enlisted."

The enlistments, alluded to in the third section, are the same enlistments authorized by the second section. The bounty offered in the third section is coextensive with the enlistments authorized in the second section. The phrase "each recruit so enlisted" is commensurate with the "voluntary enlistment" authorized by the second section.

The second and third sections are inseparably connected, not only by the rules of construction, but by express reference. The word "recruit" cannot be sundered from its adjunct "so enlisted," and from its connection with the enlistment authorized in the second section, but must have each of its significations, of a person who is attached to the Army either by an original enlistment, or by a re-enlistment.

It is further objected, that the act of 1850 is "an act to increase the rank and file of the Army and to encourage enlistments," and that, although every soldier on service should re-enlist at the expiration of his term, still there would be no increase of rank and file without an accession of new recruits.

That is true, as a proposition of fact, but it does not, in my judgment, draw after it the supposed consequence of the restricted construction of the statute.

The act of August 23d, 1842, (v Stat. at Large, p. 512,) had fixed the maximum of privates of each company of dragoons at fifty, and of each company of artillery and of infantry at forty-two, besides the commissioned and non-commissioned officers.

The act of 13th May, 1846, (ix Stat. at Large, p. 11,) had authorized the President, "by voluntary enlistments," to increase the number of privates in each or any of the companies of the existing regiments of dragoons, artillery, and infantry, to any number not exceeding one hundred, whenever, in his opinion, the exigencies of the public service may require the same, and to reduce the same to sixty-four, when the exigencies, requiring the present increase, shall cease;" but this act was

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repealed by the 2d sect. of an act making appropriations for the Army, passed 14th August, 1848, (ix Stat. at Large, p. 306.)

By an act, approved 19th May, 1846, (ix Stat. at Large, p. 13,) a regiment of mounted riflemen was authorized to consist of ten companies, of sixty-four privates each, (besides commissioned and non-commissioned officers.)

This act also made an appropriation to pay the expenses of each military station or defence, which the President may deem necessary on the line of communication with Oregon.

Such was the condition of the military establishment, when the act of 1850 came to authorize the augmentation of the rank and file to seventy-four, under the particular circumstances indicated by the act.

Now, however true it may be, that re-enlistments alone will not increase the rank and file, which can be effected only by new recruits, yet re-enlistment is one of the means of a permanent increase of the rank and file, without excluding raw recruits. For the companies then, at the time of the passage of the act, serving, or which might hereafter serve, on the western frontier, and at remote and distant stations, were to be increased, and, when increased to the full complement authorized, the ranks were liable to be thinned by promotions, by commissions, by deaths and wounds, and disabilities contracted in the service, by expiration of the terms for which enlistments were made, by superannuations and other causes; and, therefore, Congress provided the means, not only to fill the ranks in the first instance, but to fill up vacancies, from time to time, happening by any of the various causes which tend to diminish the numbers of the Army.

The act of 17th June, 1850, is not of limited duration, nor for the temporary purpose of filling the ranks of the Army on a single occasion. The high bounty is held out, not for enlistments generally, but for enlistments at, or in the vicinity of, the military posts on the western frontier, and remote and distant stations; thereby to fill the ranks, and to keep them filled, to meet the exigencies of that peculiar service. It was enacted for the public good, upon considerations of great moment, being designed for the more complete defence of the frontier settlements against Indian hostilities, for the better fulfilment of the

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stipulations made by the United States, in the eleventh article of their treaty with the Republic of Mexico, of 2d February, 1848, and to meet circumstances growing out of our settlements in Oregon and California. Therefore, the act ought to be construed liberally, so as to attain, as far as possible, the beneficial objects contemplated by Congress.

I think, in conclusion, that the two acts of July 5th, 1838, and June 17th, 1850, which are *in pari materia*, are to be taken and construed together as one system, with parts explanatory one of the other; and that the 29th section of the former, and the 3d section of the latter, may well stand together. There is nothing, in the act of 1850, to repeal, counteract, or absorb the 29th section of the act of 1838. There is nothing in the act of 1850 to exclude soldiers from re-enlisting; or, when they re-enlist under the prescribed circumstances, to deprive them of the peculiar reward and bounty of the act. The long-standing policy of the Government, of holding out special inducements to soldiers to re-enlist, forbids the idea that the provisions of law, applicable to re-enlistments, are, in this case, to be considered as repealed by implication, through a construction of the word "recruit," which admits only one of its significations, and rejects another of which it is susceptible, which better comports with the object of the particular statute, and which is fully sustained by reference to other acts of Congress.

I reiterate, therefore, my conformity in opinion, as to this question, with yourself and the Adjutant General.

I am, very respectfully,

C. CUSHING.

Hon. JEFFERSON DAVIS,
Secretary of War.

PRIZE AGENTS.

It is the duty of prize agents to deposit all moneys in their hands in the Treasury of the United States.

ATTORNEY GENERAL'S OFFICE,
October 24, 1853.

SIR: I have considered the question of the proceedings insti-

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tuted against Mr. Charles T. Stewart by a former Secretary of the Navy, Mr. Graham, in the District Court of the United States for the Eastern District of Louisiana, submitted to me by your letter of the 14th of May.

It appears that Mr. Stewart was sued, as Prize Agent, for non-compliance with the provisions of the act of Congress of March 3d, 1849, requiring of prize agents to deposit all moneys in their hands in the Treasury of the United States.

These proceedings were instituted in accordance with the construction of the law taken by Mr. Attorney General Johnson. (Opinion in Roger's Case, July 24th, 1849. Opinions Cong. ed. 1851, p. 2034.)

Subsequently, on a reference of the present case to Mr. Attorney General Crittenden, he advised that the question should be left in the train it then was, to be decided by the proper judicial authorities of the United States. (Opinions, vol. v. p. 142.)

I should, as a matter of course, acquiesce in the direction thus given to the subject by two of my predecessors, unless I were fully satisfied that they erred as to the entire law of the case, or some decisive change of facts should now be made to appear. No new fact is presented, except that judgment has been given by the District Court in favor of Mr. Stewart, and against the United States, who have entered an appeal to the Circuit Court.

High as my respect is for the judicial tribunals of the country, and for the judge of the District Court of the United States for the Eastern District of Louisiana, personally, yet I cannot accord to any such judgment a force beyond that of an opinion of the Attorney General. To do so, would be to transfer to the District Courts that conclusive authority, which belongs by law only to the Supreme Court of the United States.

Looking into the law of the case for myself, then, I see that, for aught which appears in the documents before me, the prize-money held by Mr. Stewart may be divided into two classes, viz.:

1. Money which he holds as attorney in fact of the parties interested, by powers given, whether before or after the act of Congress requiring payment of prize-money into the Treasury.

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2. Money which he holds under the order of the Prize Court, by rule made either before or after the date of the act of Congress aforesaid.

Now, whatever balance of reason there might be for discontinuing the appeal, provided all the money held by Mr. Stewart belonged to the first class, on the other hand, the weight of reason is for allowing the suit to go on as to any money of the second class, held by Mr. Stewart under public, not private authority, that is to say, the order of the Prize Court, more especially, if an order of date subsequent to that of the act of Congress.

I cannot, therefore, advise the Department to desist from the legal inquiry, counselled by my predecessors, and imposed upon the Department, apparently as a duty, under the act of Congress, not merely for the purpose of properly disposing of the money held by Mr. Stewart, but also to determine the question of the validity and application of the statute itself.

I am, very respectfully, your obedient servant,

C. CUSHING.

Hon. JAMES C. DOBBIN,
Secretary of the Navy.

CLEAVELAND BREAKWATER.

The Topographical Bureau, in charge of the pier and breakwater constructed by the United States for the improvement of the harbor of Cleveland, may lawfully enter into contract for the use of the same by railway companies.

ATTORNEY GENERAL'S OFFICE,

October 26, 1853.

SIR: I have the honor to acknowledge the reception of your letter of the 10th instant, regarding the application of certain railway companies, which bears upon the public interests and rights in the harbor of Cleveland, in the State of Ohio.

In my reply to your letter of the 21st of September, respecting the apprehended encroachments on the harbor of Waukegan, and the public works there, I have expressed the opinion that sufficient authority exists by law to protect, in all such cases, as

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well the navigation rights of the community at large, as the particular interests of the United States.

This opinion, although specially drawn forth by the case of the harbor of Waukegan, yet applies in doctrine to that of Cleaveland, and, generally, to works of the same nature in other parts of the United States.

The legal power of the Government in the premises being established, the question to what degree, and in what manner, in fact, the applications of the railway companies aforesaid can, consistently with the public interests and rights, be acceded to, is, primarily, a question within the special competency of the Topographical Bureau. That is to say, no legal objection occurs to me, forbidding such an arrangement, in that relation, as the judgment of the Department may dictate.

I advise, therefore, that the officer of the Corps of Topographical Engineers, in charge of the works at Cleaveland, be instructed to confer with such of the companies, above mentioned, as desire the privilege of occupying any part of the pier of Cleaveland, in order that, in or after such conference, a contract may be drawn up, which, while according proper conveniences, if possible, to the railway companies, shall guard the public rights in the navigable waters of Lake Erie, and those of the Government in the harbor improvements at Cleaveland.

I am, very respectfully, your obedient servant,

C. CUSHING.

HON. JEFFERSON DAVIS,
Secretary of War.

CASE OF CAPTAIN VOORHEES.—COURTS MARTIAL.

A sentence of suspension merely by a naval court martial does not deprive the party of pay and emoluments.

It is in the power of the Secretary, or other authority appointing a court martial, to order the case back for revision both in the Army and Navy.

But this must be done before the court has actually been dissolved.

ATTORNEY GENERAL'S OFFICE,

October 27, 1853.

SIR: My attention has been called recently to a communi-

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cation of the late Secretary of the Navy, (Mr. Kennedy,) of date October 27th, 1852, addressed to my predecessor, and asking the opinion of the Attorney General, as to the case of Captain Philip F. Voorhees, of the United States Navy, the question being still undisposed of.

The facts of the case, in so far as they seem to me to be material to the questions of law to be resolved, and as gathered by me from the voluminous records transmitted to this office by the late Secretary, are as follows, namely :

On the 14th of June, 1845, the then Secretary of the Navy (Mr. Bancroft) ordered a court martial, and detailed the officers of the Navy to try Captain Voorhees, on three certain charges, with specifications of charge.

The court convened at Washington, accordingly, on the 24th of June, 1845, and proceeded in the trial pursuant to the forms of law, and found the respondent not guilty of the first charge, but guilty of the second and third charges, and sentenced him, thereupon, "to be suspended for the term of eighteen months."

The court having made up and certified the record of its proceedings, finding, and sentence, was thereafter, on the 24th of July, 1845, adjourned without day, in obedience to an order to that effect, from the Secretary of the Navy.

Afterwards, on the 31st of July, 1845, the Secretary of the Navy ordered the court to re-assemble, in order to revise the case; and the court accordingly re-assembled on board the *North Carolina*, at New York, on the 5th of August, 1845. Upon this revision of the case, the court were advised by the Judge Advocate, (Mr. B. F. Hallett,) that it was to be confined entirely to a reconsideration of the matter of record in the former proceedings, including the finding and sentence; and that they might adhere to, or correct any conclusion therein, and either lessen or increase the nature and degree of the sentence within the limits of the law applicable to the subject-matter. The court proceeded accordingly, the defendant not pleading anew, and no new evidence being received; and after such revision of the record, adhering to their previous findings, the court sentenced Captain Voorhees "to be dismissed from the Navy of the United States." They unanimously signed the revised sentence, with explanation of their reasons for the

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former and the present conclusions, and closed the whole with a recommendation of the accused to the merciful consideration of the confirming power, "because of his uniform character, previous to these occurrences, for integrity, his gallant services as an officer, and his long continuance in the naval service, without reproach or dereliction of duty."

This recommendation had its effect; and on the 29th of September, 1845, the President of the United States (Mr. Polk) mitigated the sentence from dismissal into "suspension from duty, without pay or emoluments, for five years."

Subsequently, on the 7th of January, 1847, the President of the United States, upon reconsideration of the case, and of the general merits of Captain Voorhees, ordered "that the said Captain Philip F. Voorhees be restored, from this 7th day of January, 1847, to his rank, and all his rights and privileges, pay and emoluments, as a captain in the Navy of the United States;" thus remitting and pardoning so much of the mitigated sentence as remained unexecuted.

It further appears, that soon after this, Captain Voorhees was ordered on duty, in command of a squadron, in manifestation of his complete rehabilitation, in honor as well as rank, in the judgment of the Government.

Upon these facts, Captain Voorhees insists,

1. That the first sentence of the court, of suspension for eighteen months, did not deprive him of his pay and emoluments during that suspension.

2. That the reassembling of the court, after its adjournment without day, was illegal, and that the subsequent proceedings and sentence are, of course, null and void.

3. Whereupon, Captain Voorhees claims to be remitted to the legal conditions of the first sentence, and to receive his pay and emoluments from the 29th of September, 1845, to the 7th of January, 1847, that is, during the time of his actual suspension, which he therefore contends are lawfully due to him, and have been unjustly withheld.

These are the questions in the case, on which the opinion of the Attorney General is desired.

In regard to the first point, there is no room to dispute, and no need of argument here to show, that a sentence of suspen-

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sion only, does not deprive an officer of his pay and emoluments. The language of the statute is: "Whenever a court martial shall sentence any officer to be suspended, the court shall have power to suspend his pay and emoluments for the whole or any part of the time of his suspension." (ii Stat. at Large, p. 80.) The court had the legal power to deprive of pay; but they did not do it. Conformable to this idea is the plain import of the statute, and its settled construction. (Mr. Mason's opinion of October 16th, 1845, ante, vol. iv., p. 445.)

But, if the view of Captain Voorhees is correct on the second point, he has no occasion to make the question whether "suspension" comprehends "suspension of pay;" for if the proceedings on the reassembling of the court are void, then all which went before is void; for the first sentence of the court has never been approved, and it is too late now to do it, after the remission and pardon by President Polk.

In regard to the second point, my opinion is positive; but from the peculiarity of the question, and from the divergence of dicta on the subject, in the English and American authorities, some exposition may be requisite for the justification of the conclusions to which I have arrived, especially as it is in apparent conflict with an assumed usage of the Department.

It is laid down as a thing not open to controversy, in all the books of military law, that the superior authority may order a court martial to reassemble to revise its proceedings, and its sentence. (Hough on Courts Martial, p. 29; i McArthur on Courts Martial, p. 136; Griffith's Notes, p. 90; Kennedy on Courts Martial, p. 229, 290; Anon., Observations on Courts Martial, p. 38-65; Tytler's Mil. Law, p. 170-338; James' Collection, p. 556; Simmons' Practice, 389; De Hart on Courts Martial, p. 203; O'Brien's Mil. Laws, ch. 23.)

The British Mutiny Act, near the middle of the last century, imposed a limit on the power of revision as it previously existed, by enacting that a revisal shall be ordered only once; whereas, before that, it was subject to be ordered any number of times, at discretion.

The late Major O'Brien, in his work on Military Law, expresses the opinion that, in this country, the approving power may, if it feel disposed, send back the proceedings for

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revision any number of times. (O'Brien, p. 279.) I doubt the soundness of this opinion. The general rule is that English statutes passed before the Revolution, and in amendment of the common law, are to be assumed as part of the common law of the Colonies, (*Going v. Emery*, xvi Pick. 107–116; *Commonwealth v. Leach*, i Mass. Reports, 59.) In this point of view, the English law, except where it is contradicted by, or incompatible with, our own constitutional or statute law, our judicial decisions, or the spirit of our institutions, has come to be recognised as law in many of the States; and although there is no principle of the common law which pervades the Union and exists independently of the laws of the States, (*Lerman v. Clarke*, ii McLean's Cir. C. Rep. 568); and no principle which pervades the Union, and has the authority of the law, except such is embodied in the Constitution and laws of the United States, (*Wheaton et al. v. Peters et al.* viii Peters, 591;) still, we have to go to the common law as the suggestive, if not the authoritative, source of many doctrines of law, the forms of practice, the general principles of reasoning, and even the very meaning of the terms of law. And this theory applies to the jurisprudence of an exceptional forum, for instance, military or ecclesiastical, as well as to the ordinary forums of law or equity. (*Van Ness v. Pacard*, ii Peters, 144.) I should, for these reasons, as well as for general considerations hereafter stated, incline to the belief that the power of revisal here is, in this respect, under the same limitation as in Great Britain.

However this may be, the power, of ordering a case back to a court martial for revision, must be conceded as indubitably existing both as to the Army and the Navy of the United States.

Its apparent singularity arises from the want of careful scrutiny of the thing done, and of the nature of a court martial in its relation to the confirming power.

Revisal by court martial is not a case of new trial. If it were, it would, in the present case, be unlawful. The 5th article of amendment of the Constitution, provides that "No person shall be subject, for the same offence, to be put twice in jeopardy of life or limb." This provision is in accordance with a well known doctrine of the law of England, to the same effect. That is to say, by the common law, as understood and adminis-

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tered both in England and the United States, there cannot be a new trial *at the instance of the Government*, in a case of treason or felony, though there may be in case of misdemeanor, where a party is alleged to be improperly convicted, but not where he has been acquitted. (i Chitty's Com. L. p. 664 and note. We may admit for the argument's sake, that this doctrine applies to trials by court martial, as well as by the civil judicature. Indeed, Mr. Attorney General Wirt has given an official opinion, that though there may be a new trial by court martial, on application of the party, yet it cannot be lawfully ordered *in invitum*. (Opinions, ante vol. i, p. 233, September 16th, 1818: see, also, *United States v. Gibert and Others*, ii Sumner, 19.)

But the present, I repeat, is not a case of a new trial. A new trial is a rehearing of the case. A court martial on revisal does not rehear the case: it only reconsiders the record for the purpose of correcting or modifying any conclusions thereon. The true analogy of such a revisal, to take an example from the practice of civil courts, is the case of a jury sent out by the court to reconsider its verdict. Such is the whole current of authorities, as well in the United States as in Great Britain.

But one further question, it seems to me, then remains in the case, and that is, whether the proceedings on revisal are null by reason of the fact that the court reassembled after adjournment without day; there being no possible doubt of the power of revisal before such adjournment. Now, it so happens, that on this precise point, the English and American authorities are at variance. The received English text-book on the practice of courts martial,—Simmons,—refers expressly to adjournment *sine die*, and reassembling for revisal afterwards, as a usual fact. (Simmons' Courts Martial, p. 389, note.) On the other hand, O'Brien, while recognising the authority of the revising power to send back for reconsideration, says explicitly: "But none other than such authority has a right to do this, *nor can it, in any case, be done after the court is dissolved*." (O'Brien's American Military Laws, p. 279.) Adjournment without day is to all practical purposes the dissolution of a court martial: it is

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the usual mode of finally terminating its sessions, and it is undoubtedly the "dissolution" contemplated by O'Brien.

In this discrepancy and conflict of the most approved text-books, it becomes necessary to define the law according to the reason of the thing, the cognate provisions of law, and the character of our Government. I think there is no want of safe guidance here to a true and just conclusion.

The power of the Secretary of War or Navy, or other lawful authority, to send back a case to the court martial for revisal, is called a singularity in jurisprudence. On the other hand, its apparent singularity, as we have seen, arises from not duly regarding the nature of a court martial, and its relation to the approving power. Until the sentence of a court martial has been approved or disapproved, the case still remains *sub judice*. In fact, the analogy of a court martial is that of a jury in the trial of a civil case, the approving power in the former occupying the relation of the judge in the latter. The judge remands the case to the jury for further consideration. The verdict must be accepted by the judge, and judgment rendered accordingly, before the verdict can have its complete execution and effect, whether of conviction or acquittal. So, in the corresponding case, it must be with the proceedings of a court martial as respects the approving power.

The opposite impression has been derived from erroneous estimation of the fact that a court martial graduates punishment in addition to finding the verdict of guilty. So may a jury. There is nothing in the nature of the institution of a jury to forbid its measuring the sentence, as well as judging of the question of guilt or innocence. By the time-honored practice of the common law, the jury measures the damages in all cases of unliquidated demand between party and party. Why not the same in criminal affairs? In fact it does so by the law of Virginia, (Code of Virginia, ch. 199, sect. 23-24,) and of some other States of the Union. Thus the analogy is complete between a jury and a court martial.

Now, although, if the jury, through mistake or evident partiality, deliver an improper, or an informal or insensible verdict, they may be directed by the court to reconsider it, and remanded for that purpose, (i) Hale's P. C., 299; (ii) Hawkins, P

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C., chap. 47, sect. 11; vii Bacon Abr. Verdict (G); i Archbold's Crim. Prac., by Waterman, 194,) yet it is unheard of, that, after the dismissal of the jury and the adjournment of the court without day, the judge shall, at a subsequent time, reassemble the jurors, and call upon them to revise their verdict. On the contrary, under such circumstances of imperfect verdict, thus reserved by the court for consideration, because of its imperfection, the only remedy is a new trial, if it be a case of misdemeanor admitting of new trial, and, if otherwise, then a judgment of acquittal, (i Chitty's Com. L. by Perkins, 646; *Rex v. Keite*, i Lord Raymond, 138, 141; *Rex v. Huggins*, ii Lord Raymond, 1574, 1585; *Rex v. Burridge*, iii Peere Williams, 439, 499.)

This doctrine, which is reasonable in itself, must, it seems to me, be applied to the question of revisal by courts martial. It is far more in conformity with the general spirit of our institutions, (see O'Brien's Mil. Laws, ch. 23,) and is in harmony with the express provisions of law.

Instead of countenancing the revisal by a court martial, after dissolution, a process teeming with delay of the final decision, and with procrastination of the arrest of the respondent, the 39th article of the rules for the government of the Navy, approved 23d April, 1800, (ii Stat. at Large, p. 51, chap. 23,) enacts that—"When the proceedings of any general court martial shall have commenced, they shall not be suspended nor stayed on account of the absence of any of the members, provided five or more be assembled; but the court is enjoined to sit from day to day, Sundays excepted, until sentence shall be given. And no member of said court shall, after the proceedings have commenced, absent himself, unless in case of sickness, or orders to go on duty from a superior officer, on pain of being cashiered."

This article intends to secure to the officers a speedy and impartial trial, when charged with offences, and put under arrest, and to give them a protection against delay of justice, and protracted arrest. It is enacted in the spirit of the VIth article of the Amendments to the Constitution of the United States.

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But this article would be comparatively impotent, if, after proceedings begun, sentence given, court dissolved, and the members dispersed, the members may be ordered to reassemble and review their sentence. If it may be done at the end of a week after the court has given its sentence and been dissolved, why not after a month, or a year, or more? And so, an officer might be kept under arrest, and deprived of his sword and command, during the pleasure of the Secretary of the Navy.

While, therefore, in the present case, I do entire justice to the purposes and objects of the Secretary of the Navy, who ordered the present revisal, acting on the authority of a usage of the Department, real or supposed, and acting in his best judgment, doubtless, for the government of the Navy, yet I feel constrained to say that the course taken was not in accordance with my convictions of law.

This opinion leaves unimpaired the authority of the approving power to order a court martial to revise its proceedings in all cases where the court is held under circumstances of speedy access to that approving power; that is to say, to all cases of courts martial, held in the United States under the direction of the Secretary of War or Navy, and to all other cases of courts martial in the field or abroad, save the exceptional ones, in which the proceedings and the sentence must be submitted to the President. In these exceptional cases, owing to the remoteness of the place of sitting of the court, or other causes, it will have been dissolved, probably, before the case can be submitted to the President. But he can either approve or disapprove, then, or approve partially and mitigate the sentence; and if the power of ordering revisal be lost thus, in some cases, it is to be remembered that the power of revisal is one, which involves much contingent delay and consequent hardship to the officer on trial, and, therefore, is not one to be favored, or at least not to be maintained in violation of any principle of general right and justice appertaining to the government of the Army or Navy.

I am of opinion, therefore, and do advise, that Captain Voorhees is entitled to his pay and emoluments for the period during which they have been withheld from him under the as-

Power of the President.

sumed validity of the mitigated sentence, as it stood on the final action of the President of the United States.

I am, very respectfully, your obedient servant,

C. CUSHING.

Hon. JAMES C. DOBBIN,
Secretary of the Navy.

POWER OF THE PRESIDENT.

A legislative act of the British Colony of New South Wales, enacting that certain proceedings may be had in the court as to deserting seamen of any foreign country in that colony, provided its government assents:—

Held, that the President cannot give such assent on the part of the United States, but that it can only be done by treaty or act of Congress.

ATTORNEY GENERAL'S OFFICE,

October 28, 1853.

SIR: I have examined the legislative act of the Colony of New South Wales, submitted to me by your note of the 24th instant, together with the despatch of Mr. Buchanan of the 4th instant, transmitting a communication to him from the Principal Secretary of State for Foreign affairs of the United Kingdom, both on the same subject.

That act, the object of which is the laudable one of more effectually preventing desertion and other misconduct of seamen belonging to foreign ships within the jurisdiction of said Colony, provides for the arrest of deserting seamen,—their delivery up on demand of the consul of their nation,—their punishment by imprisonment of from four weeks to six months, for the offences of desertion, assault on the master or other officer of the vessel to which they belong, wilful disobedience, or combinations to disobey,—and it also provides for the search of any vessel, in which it may be charged that a deserting seaman is harbored or concealed; such search to take place on warrant issued by a justice of the peace.

• Section 5th is in the following words, namely:

“Provided, always, that no search-warrant, as hereinbefore mentioned, shall be issued, and no offence, hereby made punishable, shall be prosecuted or punished, except at the instance, or

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with the express assent in writing, of the consul, vice-consul, or other consular officer or agent of the nation or state to which such ship or vessel, as aforesaid, shall belong, unless it shall have been duly notified in the New South Wales Government Gazette, under the authority of the Governor, that the government of such nation or state has by its proper officer signified its desire that this act may be enforced against the crews of ships belonging to such nation or state."

And the question is,—Whether the President of the United States, as such, has authority, by so signifying his desire, to give general effect to this act of the Colony of New South Wales.

I am of opinion that he has not. Neither the Constitution of the United States, nor the treaties between this Government and that of the United Kingdom, nor any acts of Congress, empower the President to communicate to the law of a foreign state authority or effect, which it does not possess *proprio vigore* as a law of such foreign state. I have no occasion to speak here to the question of the right of a foreign state to exercise, of its own mere authority, the penal jurisdiction and the right of search, contemplated by this act. Suffice it now to say, that, in my judgment, the Government of the United States can give express sanction to the law before me in no other way, in the first instance, save through a treaty or an act of Congress.

While commending, therefore, the general purpose of the Colony of New South Wales, in this enactment, and the comity of the British Government in communicating the same to this Government for its action in the premises, I feel constrained to advise you, that it is not within the constitutional authority of the President, by any separate act of his, to confer efficiency on this law as respects either the ships or the seamen of the United States.

I am, very respectfully, your obedient servant,

C. CUSHING.

Hon. WM. L. MARCY,
Secretary of State.

General Smith's Case.—Brevet Command.

GENERAL SMITH'S CASE.—BREVET COMMAND.

Brevet Major General Smith, assigned to the command of the Eighth Military Department, was temporarily absent therefrom under orders from the General-in-chief, for the purpose of consultation upon matters connected with his command, during which time Brevet Brigadier General Harney was ordered to the temporary command of the same Department:

Held, that Brevet Major General Smith and Brevet Brigadier General Harney were each entitled, for the time, to the pay and emoluments according to their respective brevet ranks, each being in command and on duty in such rank.

ATTORNEY GENERAL'S OFFICE,

November 7, 1853.

SIR: Your communication, referring to me the case of Brevet Major General Persifer F. Smith, colonel of mounted rifles, has been duly considered.

It appears that General Smith, having been assigned to the command of the Eighth Military Department, was "temporarily absent therefrom under orders of the General-in-chief, for the purpose of consultation upon matters connected with his command."

In the mean time, Colonel Harney, brigadier general by brevet, was ordered to repair to Texas and place himself "in position to exercise the command of the Eighth Military Department, during the absence of Major General Smith."

And the question arises, whether both officers are entitled to pay as commanders of the department at the same time. General Harney is, unquestionably, entitled to it. Is General Smith equally entitled thereto, and is the absence so temporary as not to affect his position as commander?

By article 61 of the act of 10th April, 1806, "establishing rules and articles for the government of the armies of the United States," (ii Stat. at Large, p. 366,) "officers having brevets, or commissions of a prior date to those of the regiment in which they serve, may take place in courts martial and on detachments, when composed of different corps, according to the ranks given them in their brevets, or dates of their former commissions; but in the regiment, troop, or company, to which such officers belong, they shall do duty and take rank, both in

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courts martial and on detachments which shall be composed only of their own corps, according to the commissions by which they are mustered in the said corps."

"Article 62. If, upon marches, guards, or in quarters, different corps of the Army shall happen to join, or do duty together, the officer, highest in rank of the line of the army, marine corps, or militia, by commission there, on duty, or in quarters, shall command the whole, and give orders for what is needful to the service, unless otherwise specially directed by the President of the United States, according to the nature of the case."

By section 4th of the act of 6th July, 1812, (ii Stat. at Large, p. 785,) the President of the United States is authorized to confer brevet rank on officers of the Army, for "gallant actions or meritorious conduct, or who shall have served ten years in any one grade: Provided, that nothing herein contained shall be so construed as to entitle officers, so brevetted, to any additional pay or emoluments, except when commanding separate posts, districts, or detachments, when they shall be entitled to, and receive the same pay and emoluments which officers of the same grades are now, or may hereafter, be allowed by law."

By an act to regulate the pay and emoluments of brevet officers, approved 16th April, 1828, (iii Stat. at Large, p. 427,) "officers of the Army, who have brevet commissions, shall be entitled to, and receive the pay and emoluments of, their brevet rank, when on duty and having a command according to their brevet rank, and at no other time." And the act further provides, that, thereafter, brevet commissions are to be conferred only by and with the advice and consent of the Senate.

By the General Regulations of the Army, printed in 1835, and approved by the President of the United States, in December, 1836, under the authority of law, it is provided, (Article xxxvii. p. 117,)

"1. With a view to the general defence of the Union, and a convenient distribution of the troops for that purpose, the country will be divided into military departments, according to the circumstances of the several frontiers. The command of a

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department will embrace all the regular forces stationed within it, as well as such militia as may be called into the service of the General Government to aid in its defence.

"2. This distribution of the troops, and the assignment of the officers to command, will be determined at general headquarters. These arrangements are not to be altered by commanders of departments, without special authority, except on some urgent necessity, when the fact will be promptly communicated to the general headquarters, with the reason which induced the alteration."

By the General Regulations for the government of the Army, published by authority in 1841, "Leaves of Absence" are treated of in Article 34, p. 26. Paragraph 140 provides, that "In time of peace, the commanding officer of a separate post, arsenal, &c., may absent himself, on his own leave, * * * * for a period not exceeding seven days in the same month."

Paragraph 148. "All applications for leave of absence, for a time exceeding that above specified, will be addressed, through the proper channels, to the general, commanding in chief, at the head-quarters of the Army.

Paragraph 146. "When a commanding officer wishes to avail himself of the privilege granted in paragraph 140, or whenever the commander of a department, or division, intends leaving his command, he will previously notify the next superior officer of the same."

Article 80, Pay Department, p. 342, paragraph 1247, provides that "Commanding officers of military posts, arsenals, and companies, will not forfeit the allowances to which they are entitled by reason of such command, when temporarily absent: provided the same is less than one month."

Paragraph 1253, p. 344, "No officer shall be entitled to receive additional rations for more than one command or station at the same time; nor shall the commanding officer of a military post, or arsenal, receive additional rations, when not residing at such post or arsenal; nor shall any officer receive additional rations, unless he be, during the time, at the station, or in the appropriate discharge of the duties for which the said additional

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rations are allowed, excepting the provision of paragraph 1247."

Such are the provisions of law and of regulation material to be borne in mind, in disposing of the case of General Smith.

The acting Paymaster General assumes that the paragraphs 1247 and 1253 of the Regulations for the Army, with the fact that General Harney was, for the time being, in command of the Eighth Department, preclude General Smith from receiving pay and emoluments according to his brevet rank of major general: to which the late Secretary of War adds another suggestion, that the two officers, General Smith, as brevet major general, and General Harney, as brevet brigadier general, cannot both receive brevet pay for the same command at the same time.

I do not regard the latter consideration as being entitled to the weight assigned to it, apparently, in the mind of the Secretary. The two persons are distinct, and so are their commissions, their grades, and their services. There is nothing of legal incompatibility in the idea that both may be in command at the same time in the same military department, and each entitled to his appropriate pay and emoluments, according to their relative grades and ranks in the Army. Even in civil employments it often has happened, and must oftentimes happen again, that two different persons will be, at the same period, in the same office temporarily, and each entitled to the salary established by law for the same office. It must of necessity be so in a territory so extensive as that subject to the jurisdiction of the Government of the United States. Otherwise there would, from time to time, arise absolute cessation of government, as while a territorial governor, judge, or marshal, or a foreign minister, is in transit from the place of appointment to the place of service. There is no act of Congress to preclude this, and the very contingency has been considered, and the legality of such a temporary duplication of officer and salary affirmed, in the courts of the United States. (*Bowerbank v. Morris, Wallace*, p. 124.)

Dismissing this consideration, therefore, I come to the criti-

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cal question, which is, the true construction of the particular acts of Congress and regulations of the Army.

I assume that the 61st and 62d articles of the act of April 10th, 1806, the act of April 16th, 1818, the 37th article of the regulations of 1835, and the regulations of 1841, paragraphs 140, 146, 1247, and 1248, are in *pari materia*, to be taken together, and so construed as to agree with and explain one another.

In my judgment, the "absences" alluded to in the cited paragraphs of the Army Regulations, are voluntary "absences," sought, obtained, and taken, at the pleasure of the absentee, and cannot comprehend such temporary absences from a given place as may be occasioned by obedience to orders or in the line of duty.

If this were otherwise doubtful, it would be proved by the use of the word "forfeit" in paragraph 1247. "Forfeiture" accrues from culpable disobedience to the commands of the law; from censurable omission to conform to rules and regulations lawfully prescribed.

When General Smith, in command of the Eighth Department, was ordered to head-quarters "for the purpose of consultation upon matters connected with his command," and came accordingly, he was acting in the line of his duty; he did not voluntarily absent himself from, nor desert his command; and he could not be thereby incurring a forfeiture of the pay and emoluments to which his brevet rank and command gave him title. To argue the contrary, namely, that coming to head-quarters in obedience to orders, for consultation upon the very matters of one's command, is to work forfeiture, would be palpable contradiction in the use of language and absurdity of legal consequences.

Moreover, the regulations, issued by the Department of War under the sanction of the President, are of course subordinate to, and cannot be permitted to contradict, any act of Congress. And the act of April 16th, 1818, allowing pay and emoluments to brevet officers, according to their brevet rank, when on duty and having a command according to their brevet rank, applies unequivocally, I think, to the case of General Smith, who, having been assigned to command, and when so in command, and having

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been ordered to head-quarters on the business of his command, was actually on duty while at head-quarters, and while coming to and returning from the same, quite as much as if he had been all that time on duty at the head-quarters of his Eighth Department. For the order requiring the presence of General Smith at head-quarters did not rescind the previous order assigning him to the command of the Eighth Department. He continued, therefore, to be the legal, titular, and, to use a phrase of foreign law, the proprietary commander of that department, notwithstanding that the actual command thereof had devolved provisionally on General Harney. His temporary absence, on duty by superior orders, cannot be taken as a legal destitution, or termination of his command, any more than if he should have happened to pass out of the limits of his command in the pursuit of a flying enemy, or by reason of any other incident of a campaign. As it was not a legal termination of his command, the only remaining question would be, whether, by coming to head-quarters, on the business of his command, and by superior orders, he *forfeited* the pay and emoluments of his rank in command. I have already said that even the letter of the regulations, in my opinion, could not work any such forfeiture in the present case; *a fortiori*, there could be no such forfeiture by general operation of legal principles, or by the letter of any acts of Congress.

I am of opinion, therefore, that General Smith, not having been displaced, but ordered here on the duty of his command, is entitled to pay and emoluments according to his brevet rank of major general, notwithstanding General Harney may be entitled, during his temporary command for the same time, to brevet pay and emoluments, according to his rank of brigadier general.

I am, very respectfully, your obedient servant,

C. CUSHING.

Hon. JEFFERSON DAVIS,

Secretary of War.

International Extradition.

INTERNATIONAL EXTRADITION.

In granting his mandate, at the request of a foreign government, for the purpose of commencing proceedings in extradition, the President does not need such evidence of the criminality of the party accused as would justify an order of extradition; but only *prima facie* evidence.

ATTORNEY GENERAL'S OFFICE,

November 9, 1853.

SIR: Your letter of this date communicates to me a letter of the Baron von Gerolt, Minister of Prussia in the United States, asking the preliminary process for the extradition of an alleged fugitive from the justice of Prussia.

Accompanying the letter of the Baron von Gerolt is a warrant of arrest of the party accused, setting forth the crime, which is one of the offences calling for extradition by the treaty between the United States and Prussia: said warrant of arrest purporting to have been issued on due inquiry and evidence by the competent judicial authority in Prussia, and being sufficiently authenticated by the certificate of the Minister himself; and the question is whether these documents are sufficient to justify the President in granting the requisite mandate or letter rogatory for the institution of proceedings in the proper courts of the United States.

These documents, if presented to an examining magistrate in the United States, would not suffice to authorize him to certify the criminality of the party charged, on which to found his actual extradition, because by the tenor of the treaty itself, and of the act of Congress to give effect to stipulations of this class, the examining magistrate must have such evidence in the case as would justify commitment by the local law of the State in which the examination takes place; and the documents presented by the Baron von Gerolt are not adequate to the exigencies of the law in any of the States.

Take, for example, the law of Massachusetts, (Rev. Stat. ch. 143, s. 6-11,) or that of New York, (Rev. Stat. pt. iv, ch. 2, tit. 2, s. 41-46,) or that of Virginia, (Code, ch. 17, s. 10-15;) all which require, as well for the extradition of alleged fugitive criminals as between the States, as for other cases of detention

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for alleged criminality, that it shall be made to appear to the examining magistrate, by sufficient evidence, that there is reasonable cause to believe the accusation is true. These documents do not constitute such evidence, according to the criminal practice and procedure in the United States.

But all which is asked of the President, in the present stage of the case, being his authorization, in pursuance of the opinion of certain of the judges of the Supreme Court in *Kaine's Case*, to enable the courts to take jurisdiction of the subject-matter, (see opinion of 9th September, 1853, in the case of *Wm. Calder*,) it does not appear to me that the President needs, as the basis of such authorization, all the evidence, which would be requisite in order to effect extradition. On the contrary, the conclusive evidence is to be submitted to the courts of law, and it is for them to judge whether it will justify a certificate of criminality, without which, of course, the President cannot order the extradition; so that, in the present case, no prejudice will ensue, and the ulterior proceedings may be facilitated, by acceding to the request of the Baron von Gerolt, upon the documents filed in the Department of State.

Accordingly, I advise that a mandate be granted in the present case, pursuant to the precedent established in the case of *William Calder*.

I am, very respectfully, your obedient servant,

C. CUSHING.

Hon. WM. L. MARCY,
Secretary of State.

DISTRICT ATTORNEYS.

It is not the official duty of a District Attorney of the United States to attend on the examination, by a magistrate of a State, of a complaint preferred by an officer of the Army against a citizen for violation of an act of Congress; or to leave the place of his residence to assist such officer of the Army in procuring evidence or otherwise preparing the case.

ATTORNEY GENERAL'S OFFICE,
November 11, 1853.

SIR: On examination of the correspondence between Brevet

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Major Ruff, commanding at Carlisle Barracks, and the District Attorney of the United States for the Eastern District of Pennsylvania, and the communication of Major Ruff on the subject transmitted to the Department, it appears that one Neff was prosecuted by Major Ruff before a magistrate of the State of Pennsylvania for a violation of the act of Congress of March 16th, 1802, s. 19, which subjects to punishment any person who shall purchase from a soldier his arms or uniform clothing; that after the arrest of Neff, he escaped from the hands of the officer; and that to prevent the recurrence of the evil, Major Ruff desires the aid of the District Attorney and Marshal of the United States.

I beg leave to suggest that the employment of the District Attorney to assist Major Ruff in procuring evidence, or in other matters preliminary to a prosecution, would have to be at the special charge of the War Department, which probably has not been contemplated by you.

If there be, in your judgment, occasion for the services of an attorney to assist Major Ruff in such preliminary proceedings, it would be more convenient, and less expensive to the Government, to authorize Major Ruff to employ an attorney at Carlisle at the public expense, as you undoubtedly have authority to do.

To remove all difficulty in the case, it needs only that Major Ruff prefer a complaint against Neff, or any other person pursuing similar unlawful practices, before some Commissioner of the United States entitled to take jurisdiction of such matters, in the Eastern District of Pennsylvania. He will then become entitled, as of course, to the services of the Marshal, and also to the services of the District Attorney, whenever a party is either committed or bound over by any authority, State or Federal, for trial before the District Court of the United States.

I return the correspondence herewith, and am,

Very respectfully, your obedient servant,

C. CUSHING.

Hon. JEFFERSON DAVIS,
Secretary of War.

Extradition of Fugitives from Service.

EXTRADITION OF FUGITIVES FROM SERVICE.

In general, it is not the duty of the United States to assume the legal defence by counsel of marshals and other ministerial officers of the law, where these are sued for official acts.

But the President of the United States, in the discharge of his constitutional duty to take care that the laws be faithfully executed, may, in his discretion, well assume, in certain cases, the defence of such ministerial officers.

The right to do this cannot be limited to cases in which the *property* of the United States is concerned, but extends to other cases, more especially those affecting the constitutional security of the Government, whether in the relation of the United States to foreign governments, or that of the States among themselves, or that of the States to the United States.

When combinations exist among the citizens of one of the States to obstruct or defeat the execution of acts of Congress, and the question of the constitutionality of such laws is made in suits against a marshal of the United States, the President is justified in assuming his defence on behalf of the United States.

Hence, a marshal being harassed with suits on account of his official action in the extradition of a fugitive from service, his defence may well be undertaken by the United States.

ATTORNEY GENERAL'S OFFICE,
November 14, 1853.

SIR: The Secretary of the Interior has referred to me a letter of the Hon. J. D. Bright, one of the Senators of the State of Indiana, with documents accompanying the same, by which the following facts appear:

In June last, Pleasant Ellington, of the State of Missouri, instituted proceedings in due form, at Indianapolis, in the State of Indiana, for the reclamation of John Freeman, a colored man residing at Indianapolis, alleging that Freeman had escaped from service due to Ellington in the State of Kentucky; and a warrant was issued by a Commissioner of the United States directed to John L. Robinson, Marshal of the United States for the State of Indiana, commanding him to arrest Freeman, and hold him to abide lawful decision in the premises. On hearing before the Commissioner the alleged fugitive applied for time to obtain evidence to disprove the claim, which was granted; and at an adjourned hearing, about two months after-

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wards, it was proved satisfactorily that Freeman did not owe service to Ellington; and Freeman was accordingly discharged and released. Whereupon he has brought suit against the Marshal for alleged misfeasance in the premises, in his arrest, detention, and personal examination.

In view of which facts, Mr. Bright inquires in behalf of the Marshal,—

1. Whether the case can be transferred from the courts of the State of Indiana to those of the United States? And

2. Whether the Marshal may be authorized to employ counsel in his defence at the charge of the United States?

In regard to the first point, I am of opinion that, both parties being inhabitants of the State of Indiana, there is no existing provision of law by which the case can be removed to the courts of the United States; and I do not think it expedient in this case, at least in the present stage of it, to suggest any other possible mode of bringing it before the courts of the United States. It may, of course, be made the subject of revision there.

As to the second point, I am of opinion that it would be proper for the President to authorize the employment of counsel at the public charge for the defence of the Marshal.

It is the constitutional duty of the President "to take care that the laws be faithfully executed." This by no means implies that he shall interpose in a matter of mere individual and private litigation. But cases do sometimes occur between private individuals, or more frequently where a public officer is a party, in which a public interest is incidentally involved, rendering it lawful and advisable that counsel be employed therein by the United States. And it may be a case of public concernment, though no property of the United States be involved; for the integrity of the Constitution and conservation of the laws are a matter of much greater importance to the Government than the defence of a parcel of the national domain, or the collection of duties on a cargo of imported merchandise. In any such case, it is a question of discretion on the part of the President, or a Head of Department, to employ counsel for the United States or not, according to his judgment

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of the particular circumstances, without its being possible to lay down any more specific general rule on the subject. I have no doubt of the power of the President in such emergencies; it is of familiar practice in the daily business of the Government.

Examples of this are not wanting in cases where no officer of the United States is a party, and no interest of the United States directly concerned, other than the general security of the Constitution or the peace and honor of the Government. Of this an illustration occurs in the part which the United States took in the case, some years since, of the indictment found in the State of New York against Alexander McLeod.

I shall not attempt to lay down any general rule of executive discretion in such cases, for the reason already intimated, that his discretion must of necessity be guided by the particular circumstances. But questions, in the execution of laws, which affect the relation of the United States to foreign governments, or the relations of the States between themselves, or to the Federal Government, may, it seems to me, call, sometimes, for the employment of counsel in behalf of the ministerial officers of the United States, whose official acts are in controversy.

In fact, the United States act, in the domestic affairs of the country, chiefly through their judicial and ministerial officers; attack on whom, while administering the laws, so as to render acts of Congress ineffective, is the first step, as all the history of the country indicates, in the progress of insurrection; and the defence of those officers, in such contingencies, is the defence of the integrity and stability of the Government, (see *United States v. Vigol*, ii Dallas 346; *United States v. Mitchell*, ii Dallas, 348; *United States v. Fries*, Pamph. Phil. 1800; Shay's case, Minot's Hist. of the Insurrection in Massachusetts.)

I think the class of cases, of which the present is one, belong to the same category, in their relation of importance to the public welfare, and to the duty of the President, and in their nature; seeing that the faithful execution of the acts of Congress for the inter-state extradition of fugitives from service, in the face of organized combinations to defeat or resist that execution, and to harass those engaged in it, by vexatious suits or

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other unlawful or unjust contrivances, is plainly essential to the peace of the country and the safety of the Union.

There is a recent provision of law, which expressly recognises the power of the President in the premises. It is the act of August 31st, 1852, ch. 108, sec. 11, which enacts—"That where the ministerial officers of the United States have or shall incur extraordinary expense, in executing the laws thereof, the payment of which is not specifically provided for, the President of the United States is authorized to allow the payment thereof, under the special taxation of the District or Circuit Court of the district in which the said services have been or shall be rendered, to be paid from the appropriation for defraying the expenses of the judiciary." (Session Laws, 1851-'52, p. 99.) For aught that I can see to the contrary, this provision of law is directly applicable to the subject-matter, and it is understood to have been so designed by Congress.

I advise, therefore, that the authority prayed for, be, under suitable regulation, given in this case to the marshal.

I am, very respectfully, your obedient servant,

C. CUSHING.

The PRESIDENT.

LIEUTENANT GILLIS' CASE.

The time, when the increased pay allowed by act of Congress to Lieutenant Gillis, as Superintendent of the Astronomical Expedition to Chile, shall cease, not being definitely prescribed by act of Congress, depends on the discretion of the Secretary of the Navy.

ATTORNEY GENERAL'S OFFICE,

November 19, 1853.

SIR: I have had under consideration the matter submitted by your communication of the 29th ult., the question upon which is as to the continuance of the increased pay of Lieutenant Gillis, of the Navy of the United States, Superintendent of the Naval Astronomical Expedition into Chile.

In the act of appropriation for the naval service, approved 3d

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August, 1848, (ix Stat. at Large, p. 387,) "the Secretary is hereby directed to expend \$5000, or so much thereof as may be necessary, in causing the observations to be made, which have been recently recommended to him by the American Philosophical Society and the Academy of Arts and Sciences."

By the act of 1851, (same vol. p. 622,) "the Superintendent of the Naval Astronomical Expedition in Chile, directed by the act of 3d August, 1848, shall receive the same amount of salary as is allowed to the Superintendent of the Naval Observatory at Washington City, while he has been or may be in charge of that expedition: Provided that the pay and emoluments shall not exceed for any one year the sum of three thousand dollars."

This act was passed after Lieutenant Gillis had left the United States, and before his return from taking the astronomical observations in Chile. It is, upon its face, both retrospective and prospective as to the increased compensation of the Superintendent. It fixes neither the day of the commencement, nor the time of the termination, of such increased compensation. Above all, it does not in express terms confine that to the time when he sailed, nor to the time when he returned to the United States. Of course, that point is, by the law, impliedly left to the determination of the Executive, in the exercise of sound discretion upon a view of all the circumstances happened and to happen.

It appears by the letter of the Fourth Auditor of February 4th, 1853, to your predecessor in office, the Hon. J. P. Kennedy, that, for the purpose of adjusting the accounts of Lieutenant J. M. Gillis as Superintendent of the Naval Astronomical Expedition to Chile, the Auditor inquired of the Secretary of the Navy, "to what day he was to regard him as having been in charge of said expedition," to which the Secretary of the Navy answered by letter of the 9th February, 1853, informing the Auditor "that Lieutenant Gillis is now engaged in preparing a report of his observations in Chile, and therefore may be considered as still in charge of that duty."

The fact so stated by Secretary Kennedy, and his decision on the fact, are, in my opinion, binding on the Fourth Auditor and the Second Comptroller, as a determination by the competent

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authority; and taking the fact as thus stated, the decision thereupon was, in my opinion, a just deduction of law, which it may be proper for you to respect and follow, as laying down a principle for adjusting the accounts of Lieutenant Gillis for services after the 9th February, 1853.

I do not think the mere fact of the address of the letter of the Secretary of the Navy of April 7th, 1853, to "Lieut. J. M. Gillis, Supt. Astronomical Expedn., &c., Washington, D. C.," concludes an examination of the fact whether Lieutenant Gillis had or had not been continued up to that time in charge of the duties of Superintendent. If his duties as Superintendent, had, in fact, ceased before the date of that letter, that address did not change the fact, and alter the truth, any more than to address a person as "colonel," or "governor," or "judge," would restore him to the functions and emoluments of the office, which he formerly held, but which he had now ceased to hold.

Nor has the letter of the Secretary of the Navy to Lieutenant McRae, of 25th July, 1853, anything in it material to the question relating to the services of Lieutenant Gillis as Superintendent. If the duties of Lieutenant Gillis as Superintendent had then ended, the employment of Lieutenant McRae was not the employing of Lieutenant Gillis, nor the renewal of his charge as Superintendent.

But, from the premises, my conclusion is, that, up to the 9th of February, 1853, Lieutenant Gillis is to be considered entitled to the increased compensation as Superintendent, allowed by the said act of 1851, because he then continued, under a lawful decision of the Secretary of the Navy, to be employed in preparing his report of the astronomical observations in Chile; and that, as to the further continuance of Lieutenant Gillis in the superintendency, after the 9th of February, 1853, it is a question of fact to be decided by the Secretary of the Navy, having in view the principles hereinbefore stated and decided by Secretary Kennedy.

I am, very respectfully, your obedient servant,

C. CUSHING.

Hon. J. C. DOBBIN,

Secretary of the Navy.

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Contracts for Stationery.

CONTRACTS FOR STATIONERY.

A Head of Department, advertising according to law for proposals for stationery, is the competent and only judge of the matters of fact involved in the acceptance or rejection of any of the proposals.

In a matter which the law confides to the pure discretion of the Executive, the decision by the President, or proper Head of Department, of any question of fact involved, is conclusive, and is not subject to revision by any other authority in the United States.

ATTORNEY GENERAL'S OFFICE,
November 23, 1853.

SIR: I have had under consideration the letter of Messrs. William F. Bayley and others, which you did me the honor to refer to me, on the subject of the contracts for stationery, entered into the present year, by the Department of the Interior.

The act of Congress requires that all stationery, for the use of any one of the Departments, shall be furnished on contract by the lowest bidder; the head of the Department advertises in due form for sealed proposals, to be opened at the appointed time by him, or under his direction, in the presence of two persons; and the bidder, fulfilling the conditions of the law and of the proposals, is to receive the contract. (Act of August 26th, 1842, ch. 202, s. 11, v Stat. at Large, 526.) The tenor of the law obviously is to make the Head of Department, in the given case, the judge of the fact of who is the lowest bidder, which is decided by him in his official discretion and responsibility.

It appears, in the present case, that the Secretary of the Interior, thus lawfully judging in the premises, assigned the contract to Messrs. Speeden & Baker; of which Mr. Bayley complains, alleging that, although, as he admits, the Secretary acted honestly in the matter, yet he decided erroneously as to the questions of fact.

Assuming all the premises as set forth by Mr. Bayley, they do not, as it seems to me, present any question, either of law or of fact, for the determination of the President.

The Secretary of the Interior, acting conscientiously, as the

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complainant concedes, has decided a question of fact, which he alone had the power to decide, according to his judgment of the truth, and has, in conformity with such judgment, awarded the contract to one of the bidders, who now has a vested right therein. The act of Congress provides no method by which that decision may be revised. It is final, so far as regards the subject-matter, that is, the particular contract, as in the case of any other matter, decided in good faith, whether erroneously or otherwise, by the official authority to whom the decision belongs.

I advise, therefore, that no further action be had in the premises, unless to refer the papers to the Secretary of the Interior for his examination.

I am, very respectfully, your obedient servant,

C. CUSHING.

The PRESIDENT.

EXTRADITION OF FUGITIVES FROM JUSTICE.

Where a court of one of the States assumes to take, by *habeas corpus*, out of the hands of a marshal of the United States, a person held by him as a fugitive from crime committed in a foreign country, and under reclamation by treaty, the United States may well, by counsel and direction, protect their marshal in the maintenance of the laws, and in discharge of public faith towards the reclaiming foreign government.

ATTORNEY GENERAL'S OFFICE,

December 13, 1853.

SIR: It appears, by your note of this day, submitting to me a letter of the Marshal of the United States for the Southern District of New York, that, on the 22d day of November last, process was issued by a Commissioner of the United States for the arrest of Alexander Heilborn, alleged to be a fugitive from the justice of Great Britain, with a view to the extradition of said Heilborn, under the subsisting treaty between the United States and Great Britain; that, after the arrest of Heilborn, and pending the examination of the case by the Commissioner, the prisoner was taken before one of the justices of the Supreme

Superintendent of Public Printing.

Court of New York, on *habeas corpus* granted by that judge; and, in anticipation of a possible order of the State Court, discharging the prisoner, the marshal asks to be allowed counsel by the United States, to advise and defend him in the discharge of his duty in the premises.

My first impression of the question was, that the facts, as being of an ordinary case of extradition, were not such as to impose on the United States any obligation to interpose.

But further reflection has changed my view, as well of the facts, as of their political relations. I find that the present case belongs to a general class of cases, of daily increasing number and gravity, in which a single judge of some State, by what seems to me, if not the abuse, at least the indiscreet use, of the authority to grant the writ of *habeas corpus*, obstructs the laws, and, in effect, defeats the tribunals of the United States, in matters of unquestionable and proper jurisdiction of the Federal Government. It seems to me greatly to concern the public service, that the dignity and the rights of the United States, in these cases, should be maintained; which can be done by defending the marshal. I advise, therefore, that, in the present case, the Marshal of the Southern District of New York be empowered to call in aid the professional services of the District Attorney of that District.

I am, very respectfully,

C. CUSHING.

Hon. ROBERT McCLELLAND,
Secretary of the Interior.

SUPERINTENDENT OF PUBLIC PRINTING.

The requisitions of the Superintendent of Public Printing are to be made by him directly on the Secretary of the Treasury, and do not require to be approved by the Secretary of the Interior.

ATTORNEY GENERAL'S OFFICE,
December 14, 1853.

SIR: Your letter of the 13th instant, submitting the question whether the Superintendent of the Public Printing is to be

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provided with money to pay the salaries of himself and clerks and the contingent expenses of his office by draft on the Treasury through you, has been duly considered.

The act of Congress appointing the Superintendent (August 26th, 1853, ch. 91, s. 2, p. 30,) requires him to give bond for the faithful discharge of his duties, with sureties to be approved by the Secretary of the Interior.

But this provision does not warrant the inference that the Secretary of the Interior is to superintend the public printing, or cause to be paid the salaries and contingent expenses of the office of the Superintendent.

The several Heads of Departments, in common with the Secretary of the Senate and the Clerk of the House of Representatives, are to call on the Superintendent for public printing to be done by him in their respective provinces; but neither does this provision impose any special responsibility on the Secretary of the Interior in regard to the salary and other expenses of the Superintendent.

On the other hand, there is no clause of the act of Congress, which expressly and affirmatively imposes this duty on the Secretary.

I am of opinion, therefore, as the law stands, that the proper requisitions on the Treasury are to be made directly by the Superintendent, unless otherwise ordered by the President.

I am, very respectfully,

C. CUSHING.

Hon. R. McCLELLAND,
Secretary of the Interior.

 EXTRADITION OF FUGITIVES FROM SERVICE.

1. A marshal of the United States, when called upon to serve due process for the arrest of an alleged fugitive from service, has no absolute right to demand a bond of indemnity as the consideration of making service.
2. Such bond may lawfully be given by the claimant; but if he refuses, and the marshal thereupon refuses to proceed, the latter will be responsible in damages or not according as the proofs may appear of the claimant's right of reclamation of service in the case.

Extradition of Fugitives from Service.

ATTORNEY GENERAL'S OFFICE,

December 16, 1853.

SIR: I have perused and considered the letter of Messrs. Pratt, Gerard and Berkley, and the papers accompanying the same.

I perceive but one question of law in the case, and it is this: The Marshal of the United States for the State of Massachusetts, on having placed in his hands a lawful precept from a Commissioner of the United States, for the arrest of an alleged fugitive from labor in another state, insisted upon "the payment or deposit of a sum of money reasonably adequate to meet the proper charges and expenses incident to his arrest, or instead of such payment and advance, a satisfactory bond in a sum sufficient to meet such charges and expenses;" and also that the party claimant should point out the person to be arrested and his place of residence, and should give the officer "a satisfactory bond to protect and indemnify" him, in case the person arrested should be other than the one described in the warrant. And the question is, not of the obligation of the party claimant to point out the person and residence of the alleged fugitive, for of that there can be no doubt, but of the right of the officer to the previous payment or security of his expenses, and to indemnity against an action for a contingent wrongful arrest.

The act of Congress of the 18th of September, 1850, in amendment of the previous act respecting fugitives from justice and persons escaping from the service of their masters, (ix Stat. at Large, 462,) makes it "the duty of all marshals and deputy marshals to obey and execute all warrants and precepts issued under the provisions of the act when to them directed." There is no express exception in this act as to previous payment or security for fees and expenses of service or indemnity against an action for damages.

In this respect, the act does but conform to other provisions of law defining the duty of marshals. The celebrated act of September 24th, 1789, establishing the judicial system of the United States, (i Stat. at Large, 73, 87,) in section 27, provides that it shall be the duty of the marshal "to execute all lawful

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precepts directed to him, and issued under the authority of the United States."

And the Supreme Court of the United States has said: "It is the duty of the marshal to execute all process which may be placed in his hands. But he performs this duty at his peril and under the guidance of the law. He must of course exercise some judgment in the performance. Should he fail to obey the exigit (*sic*) of the writ, *without a legal reason*, or should he, in obeying its letter, violate the rights of others, he is liable to the action of the injured party." (Per Ch. J. Marshall, *Life and Fire Insurance Co. of New York v. Adams*, ix Peters, 571, 603. See also *Kennedy v. Brent*, vi Cranch, 187.)

The act of 1850, therefore, as construed by me on this point, does not impose on the marshal any new duty in this relation. But, in addition to the liability to damages to the party injured, to which he was previously subject, if he failed "without a legal reason" to obey the precept of the proper authority, he is by that act subject to a penalty, also, as for a criminal act, if he refuse to receive the warrant, or to use all proper means diligently to execute the same:—which does not change the general law as to his duty, but only enforces its performance.

To assume that the marshal is entitled to demand security or indemnity for fees and expenses of service and possible damages, before executing a precept, is to give to him a discretion, which might, it is obvious, wholly defeat the purposes of the act of Congress.

On the other hand, this act, in addition to the general provisions of law for aid to the marshal in the performance of his duty, makes very special provisions for the exigencies of the present case, that is, to enable him to resist and overcome any opposition or obstruction.

Besides which, the 11th section of the act of August 31st, 1852, making appropriations for the civil service of the Government, has made provision by which the President may allow to a marshal any extraordinary expense which he may have incurred in executing the laws of the United States. (Session Acts 1851-'52, p. 99.)

In the absence of any express or definite statute provision

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by Congress on this point of controversy, we are thrown back on the general principles of law for the solution of the question.

There is a series of adjudications in the courts of the States, which countenance the demand of the marshal; and, as the present case arises in Massachusetts, and the act of Congress of February 28, 1795, section 9, (i Stat. at Large, p. 425,) enacts that marshals of the several districts shall have the same "powers," in executing the laws of the United States, as sheriffs in the several States have by law in executing the laws of the respective States, it may be convenient to take up, as the subject of discussion, the decisions in Massachusetts.

It has been held in Massachusetts, as a doctrine of common law, there being no statute provision to this effect, that, when a sheriff is called upon to serve a precept by attaching property or arresting the person, if there be any reasonable grounds to doubt his authority to act in the particular case, that is, for instance, reasonable doubt as to the ownership of the property, or the identity of the party, he has right to ask for indemnity for his security against the risk of an action for damages. (*Marsh v. Gold*, et al., ii Pick. 285, 290; *Marshall v. Hosmer*, iv Massachusetts R. 60, 63; *Bond v. Ward*, vii Mass. R. 123, 126; *Perley v. Foster*, ix Massachusetts R. 112, 114.)

A similar doctrine, in general terms, is held in many of the States of the common law, in cases adjudged, which, however, it is unnecessary to cite at length.

But this general doctrine is subject in practice to very considerable modification and qualification.

Thus, continuing to take the decisions in Massachusetts as exposition of the doctrine, we find it is the received law there, that an officer is bound only to see that the process, which he is called upon to execute, is in regular form, and issues from a court having jurisdiction of the subject. (*Wilmarth v. Burt*, vii Metcalf, 257, 259; *Donahoe v. Shed*, viii Metcalf, 326.) And such is the common law as adjudged in Great Britain, (*Fitzpatrick v. Kelly*, cited in *Rex v. Stobbs*, iii T. R. 740; *Cameron v. Lightfoot*, ii W. Black. 1190; *Belk v. Broadbent*, iii T. R. 183; *Tarlton v. Fisher*, ii Dougl. 671.) And,

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in the cases above cited, the court in Massachusetts say that it is highly necessary to the due, prompt, and energetic execution of the commands of the law, that the officer should be required to execute all formal process to him directed by a competent authority. "It will not do," says Parker, Ch. J., in *Sanford v. Nicholls*, xiii Massachusetts R. 288, "to require of executive officers, before they shall be held to obey precepts directed to them, that they shall have evidence of the regularity of the proceedings of the tribunal which commands the duty: such a principle would put a stop to the execution of legal process." And such is the general doctrine in other states, (*e. g.* New York, *Savacool v. Bouton*, v Wend. 170; Parker *v.* Walrod, xvi Wend. 514; North Carolina, *Cody v. Quinn*, vi Ire. 191; Mississippi, *Williams v. Stewart*, xii S. & M. 533.)

But, if we are to dispose of the point as a question of common law, it will not suffice to content ourselves with its exposition in Massachusetts or any other State.

For, in the first place, some of the States have seen that it did not answer to leave it to judicial exposition merely, to decide under what circumstances an officer might demand indemnity in the service of a writ, and have accordingly provided a statute solution of the difficulty; as for example, Virginia, (Code, ch. 152,) and Kentucky, (Statutes, x. 143.)

Secondly, upon all the statements of the doctrine in Massachusetts, (and elsewhere in the United States,) the sheriff or other officer has a right of indemnity in case of *reasonable doubt* as to the ownership of the property sought to be attached, or the identity of the person to be arrested. But who is to decide on the reasonableness of the doubt? The common law practice in the States does not afford any satisfactory *present* means of determining this point. It can only be determined afterwards, in an action of damages against the officer, in behalf of the party suing out the original process. That is to say, the general duty of the officer is to execute any formal precept placed in his hands for that purpose; if he decline to serve it without being first indemnified, on the allegation of reasonable doubt, he does so at his own peril, and it is apparent that, on action brought, he will be liable as for an

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escape, in case the jury, under proper instructions from the court, shall be of opinion that he fails to prove reasonable cause of doubt.

If, then, we look deeper into the details of the question, we reach a dilemma, which still more weakens the general doctrine. For it is well settled in Great Britain, as well as in the United States, that, if an attachment be clearly unlawful, no promise or agreement to indemnify the officer will be of any avail; and if the attachment be of doubtful legality, an agreement to indemnify him is implied in the fact of the party specially requesting of the officer to make the service. Thus, when the creditor points out certain goods, as the property of the debtor, to the sheriff, who, at the creditor's request, seizes them on legal process duly issued in favor of the creditor, and the goods are afterwards proved to be the property of a stranger, who recovers damages of the sheriff, the creditor is liable, in an action on the case in favor of the sheriff, to such damages as will afford indemnity. So also of the wrongful arrest of a person pointed out by the party obtaining the process and moving the action of the public authorities. (*Humphreys v. Pratt*, ii Dow & Cl. 288; *Fletcher v. Harcott*, Hutton, 55; *Battersea's case*, Winch. 48; *Betts v. Gibbins*, ii Ad. & El. 57; *Adamson v. Jarvis*, iv Bing. 72; *Farebrother v. Ansley*, 1 Camp. 343.) That is to say, if the process be lawful, indemnity is implied: if it be unlawful, even special engagement of indemnity is a nullity.

Moreover, if we are to take the common law rule in this matter, we should take it in all its parts or incidents. The general rule in Great Britain corresponds to what, as hereinbefore stated, is the letter and spirit of the acts of Congress. For, if the officer is to decide whether a precept is of doubtful validity, and so refuse to serve it, or to decide the ownership of goods or the identity of a person to be attached, and is of his own power to demand indemnity in every case of doubt in his own mind, the result will be intolerable obstruction of the whole course of justice.

On the other hand, there may well be circumstances, where the title or the person is in dispute, and where the party suing

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out the process is not of competent means to indemnify the officer in case of damages incurred, and where the officer ought, therefore, to be protected.

How, then, are the opposing rights in such a case to be reconciled? The common law authorities answer the question. The sheriff, if he doubt as to the property, for instance, may impanel a jury to inquire as to that fact; the verdict of which, although not a justification for his refusing to proceed, yet might be received as evidence to negative the idea of a malicious refusal, (*Glossop v. Pole*, iii M. & S. 175;) or, he may apply to the court from which the process came, and the court will judge in its discretion whether the sheriff ought to have indemnity. Of course, a party may voluntarily give indemnity to the officer, if it be desired, but on his refusal so to do, the officer acts at his peril in omitting to execute the precept of the competent and lawful authority. (*Watson's Sheriff*, ch. vi., and cases there cited.)

If we undertake to apply to this case the rule of the common law in the question of doubtful property, we encounter the difficulty as to whether the rule has been adopted in the United States. In some of the States, as we have seen, the question has been settled by legislation; in others, sometimes one way, sometimes another, according to the differing views of the courts. In Pennsylvania, for instance, the common law practice, of inquest as to property by the sheriff, has not been introduced. (*Weaver v. Lawrence*, i Dallas 156; *Spangler v. The Commonwealth*, xvi Sergeant & R. 69-70;) nor has it in Massachusetts; while it has in New York. (*Curtis v. Patterson*, viii Cowen, 65, 68.)

But is the omission of the act of Congress to provide for the demand of indemnity in this case to be considered as being supplied by the common law? Or, in other words, are we to assume, because, according to the common law of some of the States, an officer may demand indemnity, that such common law right is to be deemed as interpolated into the act of Congress by construction, and this, furthermore, without any provision by which such demand of the officer can be subjected to the jurisdiction of the judicial authority issuing the precept, as in

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Great Britain? I am not prepared to say this. For there is no unwritten or common law of the United States. Such unwritten or common law is found in the respective States, and is to be the guide in a question of local law, but does not oblige the courts or other authorities of the United States in the construction of an act of Congress. (*Lerman et al. v. Clarke*, i McLean's R. 568, 572; iv Cranch 93; vii Cranch 82; viii Peters, 657.) Of course, the common law of any of the individual States, diversely construed and received as it is among them, cannot afford any answer to the imperative command of the act of Congress under consideration.

As for the section of the act of 1795, giving to marshals the same powers in their several districts as the sheriffs have in their respective States, that is part of an act to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions, and is to be construed with relation to the rest of the act and its general object. It is a provision of intended enablement, not restriction. It cannot, in itself, and still less when examined in the light of the imperative provisions of the act of 1850, be held to surround a marshal of the United States with all the possible incidents of a sheriff's office in any one of the States.

To resume, therefore, as to the question of indemnity against damages previous to executing the precept of the commissioner, my opinion is that the marshal has no absolute right to demand it; that the claimant may give it if he see fit; but that if it be asked and refused, the parties each take the risk of what shall ensue in subsequent process, the claimant that the officer may be able to show that his refusal to serve the precept was justified by the facts, the officer that he may fail to do this, and so be held to respond in damages to the claimant according to the conditions of the act of Congress.

As to the fees and other regular expenses of service, the act of 1850 provides that the officer shall receive the like fees as for similar service in other cases; that he shall be entitled to a fee of five dollars for each person "he or they may arrest and take before any such Commissioner," and such other fees as shall be deemed reasonable by the Commissioner, the same to be

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paid by the claimant, his agent or attorney. This being so, there does not seem to be any good reason for controversy as to whether they should be paid in advance or not. In the practice of the States, it has been held convenient, sometimes, to tender the officer's fees in advance, (*e. g.* *Noble v. Smith*, v John. 356;) and the courts of the United States readily grant an attachment to enforce payment, (*Caldwell v. Jackson*, vii Cranch, 276; *Anon.*, Gall. 102;) but to require them in advance, as the condition of attempting to serve the precept, does not seem consistent with the phraseology of the act of Congress.

I do not perceive, however, that you have any power to instruct the marshal in these respects; but as the present case arises in Massachusetts, where obstruction has heretofore been raised to the execution of the extradition act, it seems to me proper for the marshal to be informed, that if occasion requires and justifies it, any extraordinary expenses, which he may incur in executing the precept, will, in due form of law, be allowed him by the United States.

I am, very respectfully,

C. CUSHING.

Hon. R. McCLELLAND,
Secretary of the Interior.

EXTRADITION OF FUGITIVES FROM JUSTICE.

In case where a person, claimed as a fugitive from foreign justice, is under examination before a Commissioner of the United States, it is not in the lawful power of a State court to revise the case on *habeas corpus* and assume to overrule the Commissioner.

It is the right of the Marshal of the United States to refuse to have the body of the party before the State court, and it is the duty of the courts and other authorities of the United States to protect the marshal in such refusal, by all means known to the laws.

ATTORNEY GENERAL'S OFFICE,

December 20, 1853.

SIR: Mr. O'Connor's letter to you of the 17th instant, referred to me this day by the President, reports the present condition of the case of Heilbron, upon one of the relations of which

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my opinion was given on the 13th instant, with instructions in the premises.

The questions presented on this report are two :

1. Whether, for any of the facts set forth in the report, the marshal shall submit to a contingent order of the State court to have the body of Heilbron before it.

2. If not, of the future proceeding in the case.

As a ground of query on the facts, it is suggested that the Commissioner, if not interfered with by the State court, will, perhaps, come to the conclusion to discharge Heilbron for want of sufficient evidence of his criminality, and that therefore it is of less importance to contend in the case.

I think, however, that the principle at stake is wholly independent of this question. Shall it be understood that, whenever a criminal inquiry is pending before a court or magistrate of the United States, of a matter plainly within the general jurisdiction of the Federal authorities, as for instance, an extradition question, or a charge of mutiny or piracy upon the high seas, or a violation of the neutrality laws, that in any such case a State judge, on suggestion that the party cannot be convicted on the evidence, shall, by the *habeas corpus* process, take him away from the appropriate forum, and assume to try the case in anticipation of the conclusions of the legitimate tribunal, and on such collateral and imperfect hearing discharge the accused ? I think not. I think the possible innocence of the accused, or the possible inadequacy of the proofs adduced, does not afford any justification for interference of the State court. The guilt or innocence of the accused, the sufficiency of the proofs in the case, is the very question to be tried by the Federal magistrate under the Constitution and laws of the Union.

I advise, therefore, that Mr. O'Connor be instructed to make the point in this case, if the further proceedings of the State judge shall afford cause. The question needs decision. Already the most serious inconveniences have followed this pretension of some of the courts of the States. In Wisconsin the marshal has been interfered with in his custody of a depredator of the public lands ; in Pennsylvania, in the custody of a fugitive from labor ; in Ohio, in the custody of a person indicted as a

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public defaulter; and now in New York, in the custody of an alleged fugitive from the penal justice of England. It obviously tends to the complete nullification of the laws and paralysis of the tribunals of the Union.

As to the manner of raising the question, it seems to me the most convenient course will be to combat *habeas corpus* with *habeas corpus*; that is, if the marshal is attached by the State judge for disobedience to his illegal order, then to apply for a *habeas corpus* in behalf of the marshal to a judge of the United States. (See act of March 2d, 1833, s. 4.) Or if proceedings are instituted against the marshal for the penalty prescribed by the statutes of New York for disobedience to a writ of *habeas corpus*, then to defend the marshal, and through the successive steps of the law to bring the case up to the Supreme Court of the United States.

I am, very respectfully,

C. CUSHING.

Hon. ROBERT McCLELLAND,
Secretary of the Interior.

COURTS OF INQUIRY.

According to the 88th of the Articles of War, no person is liable to be tried and punished by a general court martial for any offence, which shall appear to have been committed more than two years before the issuing of the order for such trial, unless the person, by reason of having absented himself, or some other manifest impediment, shall not have been amenable to justice within that period.

This limitation cannot be waived by the accused, nor can he even with his consent be tried by a general court martial ordered after the time prescribed by statute.

But this limitation does not apply to courts of inquiry; for the objects of a court of inquiry are not confined to investigation as preparatory to a court martial, but extend to the legal procurement of information of any sort material to the military service or the discipline and government of the Army.

ATTORNEY GENERAL'S OFFICE,
December 30, 1853.

SIR: I have considered the question submitted by your note

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of the 29th inst., referring correspondence between the Adjutant General and the Surgeon General of the Army of the United States, which is, whether courts of inquiry are subject to the limitation which the Articles of War apply to general courts martial.

The 88th of the Articles of War provides that "No person shall be liable to be tried and punished by a general court martial for any offence, which shall appear to have been committed more than two years before the issuing of the order for such trial, unless the person, by reason of having absented himself, or some other manifest impediment, shall not have been amenable to justice within that period."

Upon this, it has been officially decided that the limitation cannot be waived by the accused, and that, even with his consent, he cannot be tried by a general court martial after the time prescribed by law. (Mr. Wirt's opinion, July 25th, 1820, *Opinions*, vol. i, p. 583.)

Whether this provision applies to garrison and regimental courts martial or not, it is not necessary now to consider.

Does it apply to courts of inquiry?

Macomb, in the *Practice of Courts Martial*, expresses the opinion that "transactions may become the subject of investigation by courts of inquiry, after a lapse of any number of years, on the application of the party accused, or by order of the President." (*Op. cit.* p. 94.)

O'Brien expresses the same opinion in the same words. (*Military Law*, p. 292.)

De Hart arrives at a different conclusion, for considerations which will be examined in the sequel. (*Military Law*, p. 280.)

In Great Britain, the law is to be taken as definitively settled on an opinion of Sir Charles Morgan, to the effect, that a court of inquiry may be ordered without regard to limitation of time. (*Tytler's Mil. Law*, p. 160.) As a question of construction, this opinion is entitled to weight here, because the British Mutiny Act contains a limitation of time, longer than ours to be sure, but much more comprehensive in its language, it not being confined in terms to general courts martial, but expressly covering all offences pun-

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ishable by the Articles of War. (See Art. xvi in Hough's Practice, p. 19.)

Simmons, in quoting the opinion of Sir Charles Morgan, criticises it on grounds of expediency hereafter considered, (Courts Martial, p. 100;) but, nevertheless, it is the undoubted law in Great Britain. (Hough's Military Law Authorities, p. 7; Griffith's Notes, p. 133.)

We thus arrive at the conclusion, first, that the limitation of time, whether by our statutes or the British, does not in terms embrace courts of inquiry, and secondly, that the weight of authority is against their being considered as constructively embraced.

The objections of Simmons are of inconvenience to the officer, whose act is the subject of inquiry, and that the power may be abused in the hands of other officers in command. The latter consideration is the general objection to all exercise of power, and its very generality constitutes its refutation; it presenting the mere question of expediency, whether or not this power, among others, may be well intrusted to a commanding general. The former consideration assumes that the question is to be disposed of on what may or may not be convenient for the accused, while, in fact, much higher and broader considerations of the public service enter into the inquiry.

De Hart's objection rests, first, on the doubts *he* entertains of the power of the President to dismiss an officer of the Army. But the power of the President in this respect being an established legal doctrine, the objection fails for want of premises. Secondly, De Hart repeats the objection of Simmons, which is founded on considerations altogether partial, and not having scope coextensive with all the conditions of the subject-matter.

I think a satisfactory solution of the whole inquiry may be deduced from reflection as to the nature and objects of courts of inquiry.

The duties of courts of inquiry are somewhat undefined; but are not unreasonably stated by Griffith, as follows:

"A court of inquiry may be considered more a council than a court, which an officer in command may take advantage of to assist him in forming his judgment on any doubtful or intricate

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subject. It is sometimes called upon to receive and methodize information only; at other times, to give an opinion on any question or subject proposed." (Notes, p. 133.)

Now, such being the objects of courts of inquiry, the question of public policy, especially in relation to the President, is, whether it be desirable, either so far as regards him, or any officer whose conduct is impugned, to deprive the Executive of the means of investigating a matter, even though it did happen more than two years previous to the commencement of the investigation. A court of inquiry covers the responsibility of the Executive; it gives to him unexceptionable means of ascertaining facts; it shields an accused officer from the mere discretion of the Executive. (See *Adye on Courts Martial*, p. 73.)

All the objections to the assumption, that courts of inquiry are not included in the limitation of the Articles of War, proceed on the premises that the only end of a court of inquiry is a court martial. But we have seen that a court of inquiry has other functions; its great purpose being to collect information, by which to guide the discretion of him who orders it, in regard to a matter of inquiry. The question, upon which that discretion is to be exercised, may be of ordering a court martial, and it may be of something else. In either case it is regular means of information, which ought to be left open to the Executive.

For instance, a court of inquiry is ordered on the incidents of a battle or on the events of a campaign. The results of the inquiry may be the ordering of a court martial: or, it may be a change of the officers in command only, for deficiency either in strategic or tactical skill, or in good fortune.

A court of inquiry may be called for the exculpation of an officer, and thus have the effect of saving his honor in the eyes of the country, as well as of the Executive, or it may be, of counteracting injurious impressions on the part of the Executive.

It may happen that questions shall arise as to an offence alleged to have been committed by an officer more than two years ago, as to which he ought to be exculpated, if innocent,

 Virginia Bounty Land Warrants.

or, if guilty, dismissed by the President, though not liable to be tried by court martial. In such a case, a court of inquiry protects the officer, and informs the conscience of the Executive.

A court of inquiry may be needed for the very purpose of ascertaining whether an alleged offence was or was not committed within two years, and so informing the mind and guiding the discretion of the Executive on the very point of the legality of a court martial.

In a word, courts of inquiry are not limited in the terms of the articles of war; it is well settled that they are not limited by construction in Great Britain; the more general conclusion has been the same in this country; and that conclusion seems to me consonant with the general principles of law, and especially convenient in a constitutional government like the United States.

I am, very respectfully,

C. CUSHING.

Hon. JEFFERSON DAVIS,
Secretary of War.

 VIRGINIA BOUNTY LAND WARRANTS.

The United States have assumed all unsatisfied outstanding military land warrants of the State of Virginia, issued by the proper authorities thereof, for revolutionary services of its officers, soldiers, seamen, and marines, such warrants having been fairly and justly issued in pursuance of the laws of the State.

Persons, called in the laws of Virginia "supernumerary officers," and in the resolves of Congress "deranged officers" are to be treated as in service, and warrants, issued to them by the State for additional land on account of such services, are entitled to be exchanged for land scrip of the United States.

ATTORNEY GENERAL'S OFFICE,
January 7, 1854.

SIR: Your letter of the 24th of August calls for my official opinion upon two questions, namely:

1. Whether, under the act of Congress of August 31st, 1852, making further provision for the satisfaction of military bounty land warrants, issued previously to a certain date by the State

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of Virginia, for service in the Revolutionary War, scrip can be granted by the United States for such of said warrants as were issued for additional land on account of supernumerary or constructive service?

And, 2. Whether scrip can be granted in satisfaction of such warrants aforesaid for additional land, as the State of Virginia may have issued on account of what is technically termed "dead service?"

The material part of the act of Congress, upon which the questions arise, is in the following words:—

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all unsatisfied outstanding military land warrants, or parts of warrants issued or allowed prior to the first day of March, eighteen hundred and fifty-two, by the proper authorities of the Commonwealth of Virginia for military services performed by the officers and soldiers, seamen or marines, of the Virginia State and Continental lines in the Army or Navy of the Revolution, may be surrendered to the Secretary of the Interior, who, upon being satisfied, by a revision of the proofs, or by additional testimony, that any warrant thus surrendered was fairly and justly issued in pursuance of the laws of said Commonwealth, for military services so rendered, shall issue land scrip in favor of the present proprietors of any warrant thus surrendered, for the whole or any portion thereof yet unsatisfied, at the rate of one dollar and twenty-five cents for each acre mentioned in the warrant thus surrendered, and which remains unsatisfied, which scrip shall be receivable in payment for any lands owned by the United States, subject to sale at private entry." (Laws of 1851-2, p. 143.)

This provision is amply definite and precise in its designation of the land warrants for which scrip is to be granted by the United States. They are:

1. Unsatisfied outstanding military land warrants issued before a certain date.
2. Such warrants issued by the proper authorities of the State of Virginia.

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3. Issued for military services performed by the officers and soldiers, seamen or marines of the Virginia continental and state lines in the Army or Navy of the Revolution.

4. Warrants fairly and justly issued in pursuance of the laws of the Commonwealth of Virginia.

I perceive no reason to doubt as to the rule, by which my own judgment is to be guided in the special matter of inquiry submitted. *I am to consider what warrants, answering in other respects to the conditions of the act of Congress, have been issued by Virginia, in pursuance of the laws of said Commonwealth.

In prosecuting this particular inquiry, if it appear that any provision of the statutes of Virginia is of questionable import, and the courts of that State have considered and construed such provision, their decision is, in my view of the settled principles of law, obligatory on my judgment, so far as any judicial exposition of statute can be. I accept and acquiesce in this doctrine as given to me by the Supreme Court of the United States in the case of *Elmendorff v. Taylor*, x *Wheaton*, 159, where the Court say by C. J. Marshall:

“This Court had uniformly professed disposition, in cases depending on the laws of a particular State, to adopt the construction which the courts of the State have given to these laws. This course is founded upon the principle, supposed to be universally recognised, that the judicial department of every Government, where such a department exists, is the appropriate organ for construing the legislative acts of that Government. Thus no court in the universe, which professed to be governed by principle, would, we presume, undertake to say the courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and, therefore, erect itself into a tribunal which should correct such mistakes. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction, than to depart from the words of the statute. On this principle, the construction given by this court to the Constitution and laws of the United States is received by all as the true construction; and, on the same principle, the construe-

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tion, given by the several courts of the States to the legislative acts of those States, is received as true, unless they conflict with the Constitution, laws, or treaties of the United States."

This doctrine has been recognised by the Supreme Court in numerous cases. (See *Polk's Lessee v. Wendell*, ii Cranch, 87; *McKeen v. Delaney's Lessee*, v Cranch, 22; *Preston v. Browder*, i Wheat. 115; *Mutual Assurance Society v. Watts*, i Wheat. 279; *Shipps et al. v. Miller's Heirs*, ii Wheat. 316; *Shelby v. Gray*, xi Wheat. 361; *Gardner v. Collins*, ii Peters, 58; *McCluney v. Silliman*, iii Peters, 277; the *United States v. Morrison*, iv Peters, 127; *Golder v. Prince*, iv Wash. C. C. R. 313.

In truth, this doctrine is the necessary application of the provisions of the act of Congress of September 26th, 1789, ch. 20, s. 34, which enacts that the laws of the several States, except where the Constitution, treaties, or laws of the United States shall otherwise require or provide, shall be regarded as rules of decision in the courts of the United States where they apply, that is, in dealing with the rights of persons or of property acquired under the laws of any given State. (*United States v. Wonson*, i Gallis. C. C. R. 5.)

And the received judicial exposition of any statute of a State by the highest judicial authority of such State, becomes as much a part of the law, when it comes to be considered by the Supreme Court of the United States, as if such exposition were a statutory enactment. (*Green v. Neal*, vi Peters, 291.)

If this doctrine were a questionable one, which it is not, the same rule of judgment would have to be followed in the present case; for the act of Congress expressly enacts, that the test of the validity of any warrant of the Commonwealth of Virginia, claiming to be exchanged for scrip, shall be "the laws of said Commonwealth."

What, then, is the law of Virginia in the matter,—the statutes, if their enactments be of indisputable import, or the judicial construction of such statutes, in case of any doubt, by the proper tribunals of that State?

By an act of the Legislature of Virginia, passed at the May session in 1779, entitled "An act concerning officers, soldiers,

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sailors, and marines," (x Henn. Stat. p. 23, ch. 6,) additional inducements were held out in money, clothing, &c., to induce enlistments or re-enlistments for service during the continuance of the war. The act then proceeds to say: "*At the end of the war* every of the said soldiers, sailors, and marines shall be entitled to a grant of one hundred acres of any unappropriated land within this Commonwealth, and every of the officers commanding the said soldiers, sailors, or marines, shall be entitled to a like quantity of land as is allowed to officers of the same rank in the Virginia regiments in continental establishment." * * * * *

"All general officers of the army being citizens of this Commonwealth, and all field officers, captains, and subalterns, commanding, or who shall command in the battalions of this Commonwealth, on continental establishment, or serving in the battalions raised for the immediate defence of this State, or for the defence of the United States; and all chaplains, physicians, surgeons, and surgeons' mates, appointed to the said battalions, or any of them, being citizens of this Commonwealth and not being in the service of Georgia, or of any other State, provided Congress do not make some tantamount provision for them, who shall serve henceforward, or from the time of their being commissioned, until the end of the war.

"And all such officers, who have or shall become supernumerary on the reduction of any of the said battalions, and shall again enter the service if required so to do, in the same or any higher rank, and continue therein until the end of the war, shall be entitled to half-pay during life, to commence from the determination of their command or service."

Another act of the same session; (x Henn. p. 51, ch. 13,) established a Land Office, and prescribed the mode of obtaining land warrants, and of selling out, granting, and surveying the waste and unappropriated lands.

Sect. ii recited that a bounty in land had been engaged to the troops on continental and State establishments, and enacted that the troops to whom a bounty in lands had been "or shall be hereafter allowed," shall be entitled to the quantity engaged to them by such laws, upon the certificates from a general offi-

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cer, or from the colonel of the regiment, or corps, &c., "that such officer or soldier hath served the time required by law, or hath been slain or died in service," &c.

The act of October session, 1779, (x Henn. Stat. p. 160, ch. 21, sect. 2,) recites that "Whereas no law of this Commonwealth hath yet ascertained the proportion or quantity of land to be granted at the end of the present war to the officers of the Virginia line, on continental or State establishment, or to the officers of the Virginia Navy, and doubts may arise as to the particular quantity of land due to the soldiers, from the different terms of their enlistments,—be it enacted, that the officers and soldiers, who shall have served in the Virginia line or continental establishment, or in the Army or the Navy upon State establishment, to the end of the present war, and the non-commissioned officers, soldiers, and sailors, upon either of said establishments,—their heirs or legal representatives, shall respectively be entitled to, and receive, the proportions and quantities of land following:

Every Colonel,	. . .	5000 acres.
Lieutenant Colonel,	. . .	4500 acres.
Major,	. . .	4000 acres.
Captain,	. . .	3000 acres.
Every subaltern,	. . .	2000 acres.

"Every non-commissioned officer, who, having enlisted for the war, shall have served to the end thereof, 400 acres; and every soldier and sailor under like circumstances, 200 acres.

"Every non-commissioned officer, who, having enlisted for the term of three years, shall have served out the same, or to the end of the present war, 200 acres.

"Every soldier and sailor under like circumstances, 100 acres.

"Every officer of the Navy, the same quantity of land as an officer of equal rank in the Army. And where any officer, soldier, or sailor shall have fallen or died in service, his heirs or legal representatives shall be entitled to receive the same quantity of land as would have been due to such officer, soldier, or sailor respectively, had he been living."

The act of October session, 1780, (x Henn. Stat. 375, chap:

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27, sect. 4,) after fixing the land bounty of a major general at 15,000 acres, and of a brigadier general at 10,000 acres, enacts that "there shall be moreover allowed to all the officers of this State, on continental and State establishments, or to the legal representatives of such officers, according to their respective ranks, an additional bounty in lands in the proportion of one-third of any former bounty heretofore granted them."

"Sect. V. That the legal representatives of any officer on continental or State establishments, who may have died in the service before the bounty of lands, granted by this or any former law, shall be entitled to demand and receive the same in like manner as the officer himself might have done when living, agreeable to his rank."

The act of May session, 1782, (xi Henn. Stat. p. 84, chap. 47, sect. ix.) enacts: "That any officer or soldier, who hath not been cashiered or superseded, and who hath served the term of three years successively, shall have an absolute and unconditional title to his respective apportionment of the land appropriated as aforesaid. And for every year for which any *officer* or *soldier* may have continued or shall hereafter continue in services beyond the term of six years, to be computed from the time he last went into service, he shall be entitled to one-sixth part in addition to the quantity of land apportioned to his rank respectively."

Sect. XIII. of this act puts the "navy officers, sailors, and marines of this State" upon an equality in all respects with the officers and soldiers in the land service, in all matters within the purview of the act. The specific question as to supernumerary or constructive service, grows out of the language of the act of May session, 1779, in connection with the statute of October session, 1780, and May session, 1782, allowing additional quantities of land. The act of 1779, upon its face, takes the distinction between officers "in command," and therefore receiving full pay,—and officers not in command, but supernumerary, because of the reduction of the battalions, and therefore receiving only half-pay until again called into command.

Officers became "supernumerary" because the ranks of the

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common soldiers had been thinned in battle,—or by the expiration of the terms for which they had enlisted,—or by other causes, so that there was a superabundance of officers and a scarcity of soldiers;—whereupon the battalions were reduced, the officers deranged, and the regiments consolidated.

The question as to supernumerary, or constructive service, as it is called, whether relating to half-pay or to land bounty, stands upon the same condition, as prescribed by the same words: "Service until the end of the war."

Did the supernumerary officers serve, according to the true and lawful meaning of the act, until the end of the war?

The Court of Appeals of the State of Virginia has answered this question in the affirmative.

The case of the Commonwealth *v. Lilly's Adm.*, (i Leigh, 526,) came up to the Court of Appeals from the decision of the Circuit Court of Henrico, in favor of the right of the supernumerary officer Lilly, by an appeal on the part of the Commonwealth. The case was elaborately argued by counsel for both parties; the judges gave their opinions, *separatim et seriatim*, and affirmed the decision in favor of the rights of the supernumerary officer, as having "served until the end of the war."

The opinion of Judge Carr contains an exposition of the statute, a short extract from which will show the foundation of the affirmance of the decision of the Circuit Court, as ordered by Judge Carr and his associates of the Appellate Court.

"What is a supernumerary? He is just as much an officer as any other; but his battalion or corps has been reduced, or disbanded, or so arranged, in some way, as to leave him, for the present, no command; and the State, to save expense of full pay and subsistence, discharges him from actual service. This is no reproach to the officer, and does not, in the slightest degree, affect his standing: he is supernumerary to-day, because it suited the purposes, or was compelled by the necessities of the State: to-morrow she calls him to the camp, and he is an officer in actual service and command."

Thus the doctrine was settled in Virginia, by the decision of her highest judicial authority, that an officer who became supernumerary, but who did not resign, and was not cashiered, nor dis-

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missed the service by the sentence of a court martial, was in service until the end of the war, according to the true meaning of the act of Virginia of 1779.

A supposition exists to the effect that the decision in Lilly's case had been overruled in a subsequent case, that of Tatum's *Ex'r. v. The Commonwealth*, ix Leigh, 56. That is an error.

The case of Tatum was of a *continental* officer, who became supernumerary before the act of 1779. Congress made provision for continental officers by granting them half-pay for life, and the commutation of that into full pay for five years, with interest. But the engagement of Virginia, as to half-pay, was,—“provided Congress do not make some tantamount provision.” Tatum, therefore, a continental officer, had, in view of the court, no claim for half-pay upon Virginia. As to bounty land, however, the case is different. To that both continental and State lines were entitled by the laws of Virginia. The promise for that was not coupled with the condition, as in the promise of half-pay, “provided Congress do not make some tantamount provision.” Congress, indeed, neither did nor could make any tantamount provision as to land bounty, for continental officers; for the Congress of the Revolution had no lands wherewith to satisfy such bounties as Virginia promised to her officers.

That such is the meaning of the decision in Tatum's case, if not clear in the analysis of the case itself, would become so, on consideration of the fact that the same court, at the same term, reaffirmed the decision in Lilly's case, in the case of Marston's *Admin. v. The Commonwealth*, ix Leigh, 36. It is not conceivable that the Court of Appeals, in November, should, in Marston's case, say that the decision in Lilly's case “has been subsequently acquiesced in, and must now be considered as settled,” and then, in the next case on the calendar but one, that of Tatum, overrule the same decision.

The cases of Tatum and of Marston are made consistent with one another, and with Lilly's case, by the considerations previously suggested, that Tatum was a continental officer, who became supernumerary in 1778, and whose claim of half-pay, being provided for by Congress, had, in the opinion of the court, ceased to attach to the State of Virginia.

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These conclusions are confirmed by the inspection of the cases of *The Commonwealth v. Peton's Admin.*, ii Grattan, 393, and *Slaughter's Admin. v. The Commonwealth*, ii Grattan, 391, in which last case Stanard, J., expressly says that he thinks Lilly's case was "correctly decided."

I concur in this opinion. The supernumerary officers were not out of commission, nor discharged. They held their relative ranks in the Army; they were entitled to promotion "in case of vacancies by death or otherwise amongst the commissioned officers, from time to time, by regular succession, in course of seniority, in their respective regiments and companies." (Ordinance of July, 1775, ix Henn. Stat. p. 11, chap. 1.) They were subject to orders to compose courts martial for trying offenders, they were liable themselves to be arraigned before courts martial for disobedience of orders, or other military offences, and to be sentenced to be suspended, or to be cashiered.

"Out of command" and "out of service" are different things in military sense. An officer on furlough is out of command, absent from the Army, but not out of the service. Several of the officers of the Navy have been for years out of command, but not out of the naval service; they are receiving their pay as officers in service, but not as under orders for actual service or command, yet liable to be ordered on naval courts martial, or into command, or upon any other naval duty, at the pleasure of the Government. An officer, taken prisoner by the enemy, and remaining in captivity unexchanged until the end of the war, was not in command, nor rendering any actual services to the United States; yet such officer was not out of commission, nor out of service, but entitled to half-pay, under the act of May sessions, 1779. (*Markham's Admin. v. The Commonwealth*, i Leigh, 516.)

In fine, the assumed prerequisite for *actual* service, or rather *active* command,—on which the denial of the rights of the supernumerary officers, in the premises, is based,—is not to be found in the express letter, or the just construction of the statutes of Virginia, promising half-pay or bounty in land to such as should serve during the war.

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The act of the legislature of Virginia, promising half-pay for life and lands to her officers, who should serve to the end of the war, became, so soon as any officer performed military service under faith of those terms, a contract, obligatory upon the State and the officer. If the State could not furnish soldiers for the officer to command,—if the State was the cause why the officer was not in command, but supernumerary and inactive, waiting orders,—the State cannot profit by her act in preventing the officer from progressing with the performance which he had commenced. If the officer was in default, by resignation or by neglect of duty, disobedience of orders or other offence, whereby he was brought to trial and sentenced by a court martial to be cashiered or to be dismissed from the service, such officer could not profit by his own wrong. On the other hand, the State could not escape from her obligation for half-pay or land bounty, by her own voluntary act in discharging the officer from service a year, or a month, or a day, before the end of the war.

Such is the doctrine of the Supreme Court in the case of *Huidekoper's Lessee v. Douglass*, (iii Cranch, p. 70.)

That case arose out of an act of the legislature of Pennsylvania, for granting out her western lands to settlers in tracts not exceeding 400 acres,—upon consideration of 7l. 10s. per hundred acres, to be paid for a warrant of every survey,—and of settlement and cultivation,—with express condition “That no warrant or survey * * * shall vest any title in or to the land therein mentioned, unless the grantee has, prior to the date of such warrant, made or caused to be made, or shall, within the space of two years next after the date of the same, make, or cause to be made, an actual settlement therein by clearing, fencing, and cultivating at least two acres for every hundred acres contained in one survey, erecting a messuage thereon for the habitation of man, and residing or causing a family to reside thereon for the space of five years next following, * * * and, in default of such actual settlement and residence, it shall and may be lawful for this Commonwealth to issue new warrants to other settlers,” &c.

“Provided, that if any such settler or grantee, in any such

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original or succeeding warrant, shall, by force of arms of the enemies of the United States, be prevented from making such actual settlement, or be driven therefrom, and shall persist in his endeavors to make such actual settlement as aforesaid, then, in either case, he and his heirs shall be entitled to have and hold the said lands in the same manner as if the actual settlement had been made and continued."

The plaintiff in ejectment had obtained his warrant of survey, paid the price of seven pounds ten shillings per hundred acres, but had made no settlement, clearing, fencing, or residence, having been prevented, (for the space of two years and eight months and some days,) from the date of the warrant, 10th April, 1793, to 1st January, 1796, from making an actual settlement, by the force of arms of the Indian enemy, but having persisted, during that space of time, in his endeavors to make such actual settlement as the statute prescribed.

The Supreme Court of the United States said, in their opinion by Chief Justice Marshall, (p. 70, iii Cranch,) "This is a contract, and, although a State is a party, it ought to be construed according to those well established principles which regulate contracts generally."

"The State is in the situation of a person who holds forth to the world the condition on which he is willing to sell his property. If he should couch his propositions in such ambiguous terms that they might be understood differently, in consequence of which sales were to be made, and the purchase-money paid, he would come with an ill grace into court to insist on the latent and obscure meaning."

The prevention for the two years and more by the public enemy, was, in the opinion of the court, sufficient to dispense with actual settlement and residence, and so was the certificate to the Circuit Court.

Well established principles, regulating contracts generally, lead to the same results in regard to the rights of officers made supernumerary by the action of the Government.

If the obligee of a bond render the performance impossible, that discharges the obligor. (Co. Litt. 206, b.; Touchstone, p. 393.)

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If he, whom it concerns to have any part of the contract fulfilled, is the occasion why it is not, it is the same thing to me as if it was fulfilled. (Powell on Contracts, p. 417.)

It is a rule common to all the conditions of obligations that they ought to be holden to be performed by one party, when the other has prevented the performance. (Pothier on Obligations by Evans, pt. 2, ch. 3, par. 212; Chitty on Contracts, by Perkins, 633-634.)

As where one is bound to deliver a deed on a day certain, and at the day is ready with the deed, and would tender it but for the evasion of the other party, this is equivalent to a tender. (Borden v. Borden, v Massachusetts R., 67.)

That is to say, the engagements of the Commonwealth of Virginia, for half-pay and bounty land, were obligatory on her in all cases where the officer, during the time of his virtual service, was prevented from active service by the act of the Commonwealth, of the public enemy, or of God.

Finally, the constituted authorities of the United States have ascribed the same construction, in favor of supernumerary officers, to the resolutions of Congress, using similar words to those contained in the statutes of Virginia, of serving to "the end of the war."

On the 22d March, 1783, (Journals by Way & Gid., vol. iv. p. 178,) Congress resolved that such officers as are *now in service and shall continue therein to the end of the war*, shall be entitled to receive the amount of five years' full-pay, or securities, on interest at six per cent. per annum, as Congress shall find most convenient, instead of the half-pay promised for life by the resolution of 21st day of October, 1780; the said securities to be such as are given to other creditors of the United States: provided it be at the option of the lines of the respective States, and not of officers individually in those lines, to accept or refuse the same; and, provided also, that their election be signified to Congress, through the Commander-in-chief from those lines under his immediate command, within two months,—and through the commanding officer of the Southern Army from those under his command, within six months,—from the date of this resolution, &c.

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On the 18th of October, 1783, (4 vol. Journals by Way & Gideon, p. 299,) Congress adopted a proclamation, announcing the peace, and that "in the progress of an arduous and difficult war, the armies of the United States of America have eminently displayed every military and patriotic virtue, and are not less to be applauded for their fortitude and magnanimity in the most trying scenes of distress, than for a series of heroic and illustrious achievements, which exalt them to a high rank among the most zealous and successful defenders of the rights and liberties of mankind." * * * "We, therefore, the United States in Congress assembled, thus impressed with a lively sense of the distinguished merit and good conduct of the said armies, do give them the thanks of the country, for their long, eminent, and faithful services. And it is our will and pleasure that such of the federal armies as stand engaged to serve during the war, and as, by our acts of 26th May, the 11th day of June, the 9th day of August, and the 26th day of September last, were furloughed, shall, from and after the 3d day of November next, be absolutely discharged by virtue of this our proclamation, from the said service: and we do also declare, that the further services in the field, of the officers, who are deranged and on furlough in consequence of our aforesaid acts, can now be dispensed with, and they have our full permission to retire from service, without being longer liable from their present engagements to be called into command."

Here we have the high authority of the Congress of the United States of America in explanation, that officers, &c., deranged or supernumerary, not in command, not in actual service in the field, and on furlough, were yet liable to be called into command, and were not out of the service, until discharged from and after the 3d November, 1783, by the proclamation above recited.

It is believed that the constituted authorities of the United States never refused to issue a certificate of five years' full pay, in commutation of half-pay for life, to any one of the numerous officers of the Continental Army, who were thrown out of active service as deranged or supernumerary, having no command by reason of reduction of the regiments and corps of the

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several States, which happened between the resolutions of Congress of 21st October, 1780, and 22d March, 1783, upon pretence that such deranged, or supernumerary, or furloughed officers were out of service, and did not serve to the end of the war. All such as applied, it is believed, were acknowledged to be entitled, and received their certificates. Certain it is, that such a refusal would have been unwarranted, and in violation of the public faith, and of the general principles applicable to contracts as before explained.

Moreover, the Congress of the United States, by the act of 5th July, 1832, (iv Stat. at Large, by Little & Brown, p. 564, chap. 173, sect. 3,) in assuming to pay the half-pay claims of the officers of the regiments and corps therein mentioned, against the State of Virginia, expressly adopted the principles then already decided in the Supreme Court of Appeals of said State; which decisions were the cases of Markham, an officer in captivity, and of Lilly, a supernumerary officer, decided in the year 1830. (i Leigh, 516-526, heretofore cited.) The supernumerary service,—whether the claim be for half-pay or for land,—presents the same identical question of law.

I am of opinion, therefore, that the persons, called in the phrase of Virginia “supernumerary officers,” or in the resolves of the Continental Congress “deranged officers,” were not out of the service, although without command; and that, in counting the period of service with references to additional bounty land, they are to be treated as in service, notwithstanding their Government failed to provide troops for them to command;—that the supernumerary officers of the Virginia continental and State lines were, by the laws of Virginia, entitled to the full quantity of land promised by her to officers who served to the end of the war;—that all warrants, issued by that Commonwealth accordingly, have been issued “in pursuance of the laws of said Commonwealth;”—and that all such warrants, provided they are in the other particular requisites conformable to the exigencies of the act of Congress, are entitled to be exchanged for the proper equivalent in land scrip of the United States.

I propose to defer to another communication the consideration.
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tion of what is called "dead service" as applied to the land warrants of the State of Virginia.

I am, very respectfully,

C. CUSHING.

Hon. R. McCLELLAND,

Secretary of the Interior.

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By the laws of the State of Virginia, the legal representatives, the heirs or devisees of any one of her officers or privates, who fell or died in service during the revolutionary war, are entitled to the same quantity of bounty land as would have been due to him had he continued to live and to serve to the end of the war, and warrants therefor lawfully issued are to be satisfied by scrip of the United States.

ATTORNEY GENERAL'S OFFICE,

January 9, 1854.

SIR: Referring to my communication of the 7th instant, on the subject of scrip, in satisfaction of military bounty land warrants of the State of Virginia for service in the war of the Revolution, grantable by the United States, under the act of August 31st, 1852, it remains for me to reply to so much of your letter of the 24th of August, as presents the question of "death or dead service," as it has been called.

This question grows out of the tenor of the act of Virginia, of May session, 1782, which provides:

"That any officer or soldier who hath not been cashiered or superseded, and who hath served the term of three years successively, shall have an absolute and unconditional title to his respective apportionment of the land appropriated as aforesaid; and for every year which every officer or soldier may have continued, or shall hereafter continue, in service beyond the term of six years, to be computed from the time he last went into service, he shall be entitled to one-sixth part in addition to the quantity of land apportioned to his rank respectively." (xi Henning, 84.)

Upon this act, the doubt is, whether the legal representatives

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of officers, soldiers, or sailors, who were slain in battle, or died in the service, during the war of the Revolution, are entitled to this last additional bounty in land for service over six years.

That the legal representatives of officers, who fell in battle, or otherwise died in the service, during the war, are entitled to the original bounty in land fixed by the act of October session, 1779, and to the first addition thereto, fixed by the act of October session, 1780, at one-third more, is too plain for doubt on the words of the second section of the former, which says: "And where any officer, soldier, or sailor shall have fallen or died in the service, his heirs or legal representatives shall be entitled to and receive the same quantity of land as would have been due to such officer, soldier, or sailor, respectively, had he been living;" (x Henning, 161;) and of the fifth section of the latter, which says, "The legal representatives of any officer on continental or State establishment, who may have died in the service before the bounty of lands granted by this or any former law, shall be entitled to demand and receive the same in like manner as the officer himself might have done when living, agreeable to his rank." (x Henning, 375.)

The question, as to the last additional bounty, enacted at the May session of 1782, arose, it is apparent, from the legislature not repeating in that act what was before enacted and in force, namely, the placing of the legal representatives of officers, soldiers, sailors, and marines, who fell in battle or died in service during the war, upon an equal footing as to land bounty, with those who were living at the end of the war.

There is no occasion to discuss here the relations of obligation by contract, upon a condition possible at the time it is contracted, performed in part, and then prevented or interrupted by the act of the public enemy or of God. That is unnecessary here, because of the explicit provisions of the acts of 1779 and 1780, which expressly enact a perfect equality of right, as to the land bounty, between the living and the representatives of the dead. The "death service" enters unequivocally into the letter and spirit of these two statutes, and the manifest intention of the legislature as therein expressed.

The earliest indication of such a purpose on the part of the

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legislature is to be found in a previous act of the same May session, 1779, in which, as the means of obtaining the land bounty promised by the Commonwealth, certificates were required,—as to the living, “that he hath served the time required by law;”—and as to the dead, that he “hath been slain or died in service. (x Henning, p. 81.) That is to say, the act assumes that, where bounty land has been promised, the decease of the officer or soldier in service does not stop the running of the time, which is to constitute one of the elements of the right to the bounty land.

Indeed, the two acts of the May session, 1779, chap. vi, promising bounty land for service “to the end of the war,” and chapter xiii, last above cited, which impliedly recognise the “death service,” (x Henning, 23 and 50,) took effect, as the law then was, from the first day of the session, and so the several provisions under review were simultaneous in operative commencement.

This intention of equality of land bounty between the living and the representatives of those killed or dying in service, in so far as regards the acts of the October session, 1779, and the October session, 1780, is, we have already seen, manifested in language adequate to express and effect that intention throughout, and to comprehend all additions.

I say, to comprehend all additions.

Let the language of the act of the October session, 1779, be reconsidered and analyzed.

After fixing the respective quantities and proportions, which the officers, soldiers, and sailors shall have for service to the end of the war, the act proceeds:

“And when any officer, soldier, or sailor shall have fallen or died in service, his heirs or legal representatives shall be entitled to receive the same quantity of land as would have been due to such officer, soldier, or sailor, respectively, had he been living.”

This enactment, from beginning to end, speaks of what shall be done at the close of the war.

The expressions “would have been due,” and “had he been living,” have reference to a future period. The whole provi-

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sion, in grammatical structure and sense, relates to events, which, at a subsequent day, shall be found to have happened. The words "shall have fallen or died in service," are of the conditional future, which represents a future action or incident, which is to be fully accomplished at or before the anticipated date of another future action or incident. Indubitably, they allude to the end of the war, and the events, which, at the end of the war, shall then be found to have happened during the war.

The statute says, "as would have been due to such officer, soldier, or sailor, had he been living;" which must mean, had he been living at the end of the war. It can have no other rational meaning.

This statute is not limited in duration; it speaks at the end of the war as authoritatively as when first enacted. When passed, it provided for the future, for events to happen, for what should be done in cases to happen during the war, not for things or events then elapsed or present, and existing at the time of the enactment. The whole providence of the act is for the future, for the end of the war, and for what shall then be done.

This section of the act must have the same force and effect at the end of the war, as if it had been that day enacted anew; for it was in force then, directing and commanding, and has not been repealed; and it was enacted specially to regulate things to be done after the peace in relation to events during the war.

Such being the scope of this enactment, it seems to me irresistible to conclude, that it comprehends and construes the acts of the October session, 1780, and May session, 1782, and brings the additional bounty lands, by those acts allowed, within the purview of the rule of equality between the living and the representatives of the deceased in service.

To the hypothesis of including in the allowance of bounty lands to the representatives of deceased persons the addition of a sixth part for service beyond six years, as ordered by the act of 1782, objection has been raised on the words,—“and hath served the term of three years successively,”—and the words, “have continued, or shall hereafter continue in service beyond

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the term of six years, to be computed from the time he last went into service."

Be it noted, that the 9th section of the act of 1782 (xi Henning, p. 84) provides for officers, and for soldiers also. An officer, who entered the service, held a commission which lasted as long as the war, and therefore he continued in service during the war, unless he was deprived of his commission by being cashiered, or dismissed the service by sentence of court martial, or unless he resigned, whereby his commission was superseded or annulled. Soldiers, on the contrary, enlisted for a term of years, and for a service of three years, were entitled to one hundred acres; and some, after being out of service, re-enlisted for and during the war; and thus, between the end of one term of enlistment and the commencement of another, there might be solution of the continuity of service. The statute, therefore, embracing the cases of officers and soldiers, makes use of expressions, some of which are applicable to officers and not to privates, and some of which are applicable to privates and not to officers.

The expressions "not cashiered or superseded," are pertinent to the case of officers, but not to that of soldiers. The expressions "successively" and "computed from the time he last went into service," are pertinent to the case of soldiers, but not to that of officers.

This 9th section must therefore be construed, *reddendo singula singulis*, by applying expressions pertinent to officers to their claims, and expressions pertinent to soldiers to theirs, without mixing or confounding them; and in this manner the true sense of the statute will be ascertained, and its purposes accomplished.

Its legal meaning, I think, is,—

"Any officer, who hath not been cashiered or superseded, and who hath served the term of three years,—or any soldier who hath served the term of three years successively,—shall have an absolute and unconditional title to his respective apportionment of the land appropriated as aforesaid. And for every year, for which any officer may have continued or shall hereafter continue in service beyond six years,—and for every year for which

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any soldier may have continued, or may hereafter continue in service beyond six years, to be computed from the time he (the soldier) last went into service,—he (the officer or soldier) shall be entitled to one-sixth part in addition to the quantity of land apportioned to his rank respectively."

In this way, it seems to me, are we to regard the additional sixth, due by the act of 1782, to officers, soldiers, sailors, and marines, actually living at the end of the war. Then, as to those, who "have fallen or died in the service," during the war, the act of 1779 comes in, and directs that their heirs or legal representatives "shall be entitled to the same quantity of land as would have been due to such officer, soldier, or sailor respectively, had he been living" at the end of the war. As to such decedents, the additional quantity of land, of one-sixth for every year over the term of six years, is to be adjusted by computation from the time when such deceased entered the service, except in the case of a soldier, sailor, or marine, who had twice enlisted, with a dissolution of service or break intervening between the end of his former service under his first enlistment, and the beginning of his after service under the second enlistment; and in such case the computation is to be "from the time he last went into service."

The several statutes of the legislature of Virginia upon the same subject, that of bounty in land to the officers and soldiers of the Revolutionary War, are, of course, to be taken together, and construed as one act, in order to ascertain the true legal intent of the lawgiver. "It is our duty," says Ch. J. Parsons, "to consider other statutes made *in pari materia*, whether repealed or unrepealed." (Church v. Crocker, iii Massachusetts R., 17-21.) "For statutes," says Ch. J. Parker, "are not to be taken according to their very words, but the provisions may be extended beyond, or restrained within, the words, according to the sense and meaning of the legislature, apparent from the whole of the statute, or from other statutes enacted before and after the one in question. The general system of legislation may be taken into view, to aid the construction of any one statute relating to the same subject." (Holbrook v. Holbrook, i Pick. 248, 254.) For it is to be assumed that a

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series of statutes, relating to one subject, was intended to be consistent and harmonious in its several parts and provisions. (Dwarris on Statutes, p. 569.)

I think the true and manifest intention, spirit, and policy of the Commonwealth of Virginia, in the whole system of laws on the subject, were to make no distinction in the pay and emoluments of her troops in the Revolutionary War, whether on continental or State service,—and especially as to land bounty, to place the representatives of those who fell in battle, or died in service during the war, upon an equality with those officers, soldiers, sailors, and marines respectively, who survived the war.

The reasonableness and justice of so providing for the families of those who were slain in battle or otherwise died in service, assuredly were not less than of giving bounty in land to those who survived to enjoy all the blessings of peace, and the incidental advantages resulting from the glorious termination of the war and the establishment of the independence of the United States.

Some statutes, we are told in the law books, are to be construed liberally; and certainly none more deserve such construction, than such as allow to the families of those who gave up their lives to the defence of their country, the same bounty as to their companions in arms, who, more fortunate than they, outlived the perils and exposure of the war.

I am not aware that this question has been judicially settled by the tribunals of the State of Virginia. It has, of course, been determined by the executive authorities of Virginia, because they have issued the warrants in question. Their action is entitled to consideration; but whether it constitutes legal doctrine or not, and is or is not obligatory on the United States, is a point which it seems unnecessary for me now to discuss, having arrived at a conclusion, satisfactory to my own mind, upon general principles of reasoning and of statutory construction.

I am of opinion, at any rate, that, by the statutes of Virginia, the legal representatives, the heirs, or the devisees of any one of her officers or privates, who fell or died in service during the Revolutionary War, are entitled to the same quantity of bounty land as would have been due to him had he been living and

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served to the end of the war, with the qualifications herein before stated;—that the State of Virginia acted rightfully in granting proper warrants on these promises;—and that such of said warrants as remain unsatisfied, assuming them to be lawful in other respects, are now entitled to be exchanged for land scrip of the United States.

I am, very respectfully,

C. CUSHING.

Hon. R. McCLELLAND,
Secretary of the Interior.

FORT AT BLACK ROCK.

A tax for grading streets, assessed on land *in transitu* from the State of New York, and from individuals therein, to the United States, held to have so much of possible right as to render it advisable for the United States not to contend.

ATTORNEY GENERAL'S OFFICE,
January 28, 1854.

SIR: I have examined the questions presented by your communication of the 9th inst.

It appears that two parcels of land, in the city of Black Rock, Nos. 167 and 186, were assessed by the authorities of the city for grading the streets contiguous to those blocks of land, amounting to the sum of \$115.39 for the proportion of the United States, and for non-payment of that assessment those blocks 167 and 185 were, on the 26th February, 1853, sold, redeemable, however, by the payment, at any time before February 26th, 1854, of principal, interest, and costs, which will, on that day, amount to \$121.95.

These two blocks of land were purchased, in the year 1842, by the United States, from several individuals, and the titles were then conveyed to the United States by and on behalf of the private owners, before the United States were assessed for the costs of grading the street.

The State of New York passed, on the 9th February, 1844, an act authorizing the Commissioners of the Land Office to cede

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and convey to the United States the title of the State to a certain parcel of land in the south village of Black Rock,—“or so much thereof as may be required by the United States of America, and necessary for the purpose of erecting and establishing a fort,” &c.

Sect. 2. “The jurisdiction over such land, the title of which shall be acquired by the United States by the first section of this act, or has been acquired under any law authorizing proceedings in the nature of a writ of *ad quod damnum*, or by purchase from individuals, of lands lying in the city of Buffalo, and in the village of Black Rock, and over all those streets, lanes, and alleys lying between blocks 186, 167, and 168, in said village, and between one and all of said blocks, and the premises described in the first section of this act, which are, or may hereafter be closed, or discontinued, for the purpose of establishing a fort, battery, barracks, parade ground, or military post, at or near Buffalo, shall be ceded to and vest in the United States of America; but such jurisdiction shall not impede,” &c.

Sect. 3. “The property, over which jurisdiction is granted by the second section of this act, shall be exonerated and discharged from all taxes and assessments, which may be levied or imposed under the authority of this State, while the said land shall remain the property of the United States, and shall be used for the purpose intended by this act, and not otherwise.

“Sect. 4. Whenever the United States shall cease to occupy the said land or any part thereof, for the purpose mentioned in the said first section of this act, then said lands shall revert to the people of this State.

“Sect. 5. This act shall take effect immediately.”

The legislature of New York had, by an act passed 21st April, 1840, (i Rev. Stat. part 1, ch. 1, sec. 51, p. 98,) authorized the Commissioners of the Land Office to cede and convey to the United States, the title of the State to so much of the land described in that act, in the south village of Black Rock, as the United States should require, and as should be necessary for a fort, &c., &c.

“Sec. 52. The jurisdiction over such lands as shall be con-

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veyed by virtue of the first section of this act," &c., "shall be ceded to and vested in the United States."

"Sec. 53. The property over which jurisdiction is granted by the second section of this act, shall be exonerated and discharged from all taxes and assessments which shall be levied," &c.

By an amendatory act, passed by the legislature of New York, February 28th, 1842, (i Rev. Stat. part 1, p. 98, sec. 55,) "The Commissioners of the Land Office are hereby authorized to cede to the United States of America, the title of this State to the point of land belonging to this State in the south village of Black Rock, lying," &c., * * * "provided the same may be required by the United States for military purposes, reserving a free and uninterrupted use and control in the Canal Commissioners," &c.

"Sec. 56. The jurisdiction over such lands as may be conveyed by the first section of this act, and such other lands as shall be purchased by the United States for the purpose of erecting a fort, battery, or other military works thereon adjacent to, or in the vicinity of, the lands owned by the United States, and occupied by the lighthouse in the city of Buffalo, shall be ceded to and vested in the United States, subject to such conditions and restrictions as are imposed by the act hereby amended."

On 17th October, 1853, the Governor of New York, by deed reciting the said three acts, passed 21st April, 1840, 28th February, 1842, and 9th February, 1844, "and agreeable to two resolutions of our Commissioners of the Land Office, dated this day," conveyed to the United States the title to certain lands, the property of the State, lying in the south village of Black Rock, as therein particularly described.

"Also, ceding the jurisdiction over such land, the title to which shall be acquired by the United States, pursuant to section 1st of the act last aforesaid, or has been acquired under any law, or by purchase, situated in the village of Black Rock," &c., &c., "distinguished as blocks Nos. 186, 167 and 168, and over all the streets, lanes, and alleys, lying between said blocks, and between one and all of said blocks, and premises,

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described in said first section of said act, which are or may hereafter be closed or discontinued by law, for the purpose of establishing a fort, battery, barracks, parade ground, or military post,—which shall be ceded to, and vested in, the United States of America, for ever, the same being required by the said United States: Provided, nevertheless, that this grant and cession shall not be so construed as to prevent or impede the execution of any process, civil or criminal, under the authority of our said State, except so far as such process may affect the real or personal property of the United States within the ceded territory, and further, whenever the United States shall cease to occupy the said land, or any part thereof, for the purposes mentioned in said first section of the act last aforesaid, then that said lands shall revert to the people of this State."

Upon these conveyances of lands by individuals, and by the State of New York, and upon the cession of jurisdiction to United States as authorized by the several acts of the legislature of New York, the question is propounded, whether the assessment for grading the streets, so made after the act of 9th February, 1844, but before the conveyance to the United States by the deed of the Governor of New York of 17th October, 1853, shall be paid by the United States?

That the corporation of the city of Black Rock had lawful authority to cause the streets to be graded, and to assess the expense thereof on the owners of the contiguous lots, is admitted, and it is stated that the State of New York paid such assessments, upon lands owned by the State contiguous to streets in the city so graded by authority of the city of Black Rock

But it is suggested that, as to those lands purchased by the United States of individuals, prior to the act of New York of 9th February, 1844, the jurisdiction of the State passed to the United States immediately upon the approval of the act of 9th February, 1844, by the terms of the 2d section, without any further act to be done by the constituted authorities of the State of New York.

That the jurisdiction over the streets in question was not effectually ceded to the United States by the act of 1844, is clear. The cession of jurisdiction over the streets was to take effect upon

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a condition, the closing or discontinuance of the streets by law, which has not happened. Therefore, the authority of the corporation to grade the streets, and to assess the cost on private persons owning contiguous lots of ground, is unquestionable. And that the United States should receive the convenience and accommodation of such graded and improved streets contiguous to their ground, without bearing their proportion of the expense, and so throw the whole burden on the private owners of lots, does not seem equitable and just.

As to the lands not comprised in the streets, and to be conveyed by the State of New York, by the authority of the Commissioners of the Land Office, it seems clear that the cession of the jurisdiction of the State to the United States was to pass, and could only pass, by virtue of the deed of conveyance, to be made to the United States for the quantity deemed necessary.

Then, as to the blocks 167 and 187, the question is, whether the jurisdiction of the State of New York ceased instantly upon the passage of the act of February 9th, 1844, or was to pass from the State to the United States, by a future matter, to be done by the constituted authorities of New York in conveying the lands alluded to in the first section of that act?

The words of the second section, in relation to jurisdiction, are in the future tense: "shall be ceded to and vest in the United States." By what shall it be done? The answer seems to be, by the conveyance authorized by the first section of that act of 1844.

Upon the three acts *in pari materia*, and upon the several sections of the act of 1844 taken together as one whole, the fair construction seems to be, that the legislature of New York intended that the land acquired by the United States previously from individuals, and the land to be acquired from the State by the conveyance of the Commissioners of the Land Office, should be regarded as one whole establishment for "a fort, battery, parade ground, or military post;" and that, when any part of such land was not used by the United States, for such military purpose as that mentioned in the first section of the act of 1844, then not only the jurisdiction, but the right of

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property of the United States should cease, and "said lands shall revert to the people of this State." (Section 4.)

This condition, expressed in section four, is annexed to all the lands comprised in the act of 1844. This is the construction which seems warranted, and is the sense in which the Governor of the State of New York has understood the three acts recited in the deed. In that sense, he has included in the deed the conveyance of the right of property of the land, which belonged to the State, and the cession of jurisdiction as to the whole, as well over the land acquired by the United States from individuals, as over that granted by the State of New York.

In addition to which, it seems to me not expedient that the title of the United States, to the blocks of land Nos. 167 and 186, should be hazarded on the issue of a lawsuit for the inconsiderable sum of money here in question.

I advise, therefore, in consideration of the whole matter, that the land be redeemed by payment of the sum requisite for that purpose.

I am, very respectfully,

C. CUSHING.

Hon. JEFFERSON DAVIS,
Secretary of War.

EXTRADITION OF FUGITIVES FROM JUSTICE.

When a Commissioner of the United States has made return according to law as to an alleged fugitive from justice, that he is lawfully subject to extradition, it is the duty of the Secretary of State to order the final writ of extradition, notwithstanding any contradictory proceedings of the courts of a State.

ATTORNEY GENERAL'S OFFICE,
January 30, 1854.

SIR: By the documents, submitted with your communication of the 28th instant, it appears that John W. Nelson, Esq., a Commissioner duly appointed by the Circuit Court of the United States for the Southern District of New York, *ad hoc*, and having lawful jurisdiction of the subject, has had before him one Alexander Heilbron, charged as a fugitive from the justice

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of Great Britain, and liable to extradition under treaty between said government and the United States; and said Commissioner has certified according to law that upon hearing of evidence in the case, and consideration of the same, it is in his judgment sufficient to sustain the charge made against said Heilbron, and said Heilbron accordingly has been committed by him to await the order of the President in pursuance of law, and said Commissioner has also made report of the testimony in the case as required by the act of Congress.

Upon examination of all which I am of opinion that it is the right and duty of the President to authorize the surrender of said Heilbron to the proper authorities of the British government, without waiting for the decision of a question of *habeas corpus*, said to have been sued out from one of the courts of the State of New York.

I am, very respectfully,

C. CUSHING.

Hon. WM. L. MARCY,
Secretary of State.

 COURTS OF THE UNITED STATES.

Analysis of the existing constitution of the judicial system of the United States, and suggestion of desirable modifications thereof.

ATTORNEY GENERAL'S OFFICE,

February 4, 1854.

SIR: I have the honor to submit, herewith, suggestions regarding the judicial system of the United States, in compliance with resolutions of the Senate and of the House of Representatives, referred to me for this purpose.

The Constitution, with its amendments, contains the following provisions, necessary to be borne in mind, as the basis of all satisfactory consideration of the subject-matter.

1. The Constitution.

"Art. III. Sec. 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior

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courts as the Congress may, from time to time, ordain and establish.

“The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior; and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

“Art. III. Sec. 2. The judicial power shall extend to all cases in law and equity, arising under the Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors and other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof, and foreign states, citizens or subjects.

“In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

“The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where such crime shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may, by law, have directed.”

2. Amendment to the Constitution.

“Art. V. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb: nor shall he be compelled, in any criminal case, to be witness against himself, nor be deprived of life, liberty, or property,

without due process of law; nor shall private property be taken for public use without just compensation.

“Art. VI. In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; and to have the assistance of counsel for his defence.”

“Art. VII. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

“Art. XI. The judicial power of the United States shall not be considered to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state.”

Such is the outline of the judicial system of the United States as defined by the Constitution. But these provisions do not designate the number of the judges of the Supreme Court, nor prescribe the organization of the inferior courts, nor the forms and limits, either of place or function, within which their various powers are to be exercised, nor the appointment and authority of the ministerial officers of the law, nor many other things essential to the practical completeness of the system, the means of doing all which are to be sought in other provisions of the Constitution as follows:

“Art. I., sec. 8. The Congress shall have power * * * * *

“To constitute tribunals inferior to the Supreme Court; * *

“To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof.

“Art. II., sec. 1. The executive power shall be vested in a President of the United States of America. * * * * *

“Art. III., sec. 2. * * * He shall nominate, and, by and with the advice and consent of the Senate, shall appoint am-

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bassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, or in the courts of law, or in the heads of departments."

In executing the powers which the Constitution has thus conferred on Congress, to provide by legislation for the details of the organization of the courts of the United States, that body has enacted numerous laws, which, while modifying the judicial system in important particulars at different periods, have invariably, from the beginning to the present time, assumed the following great elements of the system, namely :

1. A Supreme Court, consisting of a chief justice and associate justices, sitting periodically at the seat of government, with unity of constitutional power and jurisdiction, and exercised in definite forms prescribed by law throughout the United States.

2. The subdivision of the United States into judicial districts, each district consisting of a State, or a defined part of a State, with a single district judge for each district, such judge being invested with admiralty and maritime jurisdiction; jurisdiction in certain seizures on land and suits for penalties and forfeitures; jurisdiction in certain suits by aliens, by the United States, and by and against consuls; jurisdiction to grant injunctions in equity, writs of *habeas corpus*, and to perform some other acts of miscellaneous judicial power; and jurisdiction of all crimes and offences, not capital, which are cognisable under the authority of the United States. Some of these powers are exclusive, some not.

3. The distribution of the judicial districts into a less number of judicial circuits, with circuit courts sitting periodically in each district, and consisting of a plurality of judges, the district judge of the district being one, which circuit courts have original jurisdiction, in some cases exclusive, in others concurrent only, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds a certain defined

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sum, and an alien is a party, or the suit is between a citizen of the State where the suit is brought and a citizen of another State; original jurisdiction in cases of equity of a certain amount where the United States are petitioners, and of all suits at common law where the United States, or any officer thereof, shall sue under the authority of any act of Congress; original jurisdiction of crimes and offences against the United States; original jurisdiction in certain suits removed from the courts of a State, and in sundry miscellaneous matters of special provision under the patent, post-office, and other laws; and appellate jurisdiction in certain cases by writ of error to, or direct appeal from, the district courts.

The general system, thus cursorily sketched, has now stood the test of the controversies and criticism of two generations; its practical working has become familiar to the whole community; the adjudications of a long succession of eminent judges have regulated its forms and imparted precision to its action; and no other theory of judicial system presents itself, which promises any advantages commensurate with the experimental uncertainties, which a radical change of organization would introduce into the administration of justice throughout the Union. The district courts, with jurisdiction limited by the boundaries of the respective States; the circuit courts, with concurrent jurisdiction, or with original, superior, and appellate jurisdiction; and the Supreme Court, with its constitutional power, seem together to constitute a judicial system of inherent adaptation to the federative political system of the United States.

Accordingly, while Congress has in its wisdom seen fit, as occasion seemed to require, to make changes in secondary matters, such as the number of the judges of the Supreme Court, or the number and limits of the several circuits, or the personality of the circuit courts, or the quality or degrees of the relative or absolute jurisdiction of the district and circuit courts,—it has left the great monumental parts of the system as they were constructed by the same wise men who framed the Constitution.

Modifications of the judicial system, within the limits indi-

cated, especially when the number of States is more than twice what it was at the time of the adoption of the Constitution and the organization of the Government under it, and when the interests of society have outstripped, in the ratio of their exigencies, even the vastly augmented territorial extent of the country,—are imperatively demanded, not merely to give to the system completeness according to the present number of States, but to enable it, though but partially, yet at all, to discharge its appropriate functions.

At the very foundation of the Government, with but thirteen States in the Union, and comparatively small subject territory, the Supreme Court was made to consist of a chief justice and five associate justices. The number has been at successive periods increased by the addition of three other justices. If the duties of these judges did not go beyond their function as members of the Supreme Court, the present number would undoubtedly suffice, nay, is more than the public interest requires, because, in proportion to the increase of the number of judges constituting a court, is its tendency to lose its proper judicial, and to acquire instead a deliberative character.

But the great difficulty in this respect is in the present organization of the circuit and the district courts in their relation to the Supreme Court.

By the law as it now stands, the districts, with exceptions hereafter indicated, are distributed into nine circuits, and the circuit court sits, according to the theory of the law, in each district, periodically, and is composed of the district judge of that district and of one of the judges of the Supreme Court.

I say, according to the theory of the law; for, in the existing magnitude of the country, it becomes physically impossible for the judges of the Supreme Court, compatibly with their proper constitutional duties, to transact the circuit business of all the districts of the United States. Thus it happens that the entire States of California, Florida, Iowa, Texas, and Wisconsin, and districts of some other subdivided States, remain wholly outside of the system, the entire circuit duty there being performed by a district judge. It needs no argument to show that this anomalous condition of things is in plain violation of the

true spirit of the Constitution, which presupposes absolute equality of political right, of government, and of its advantages, among all the sovereign members of the Union.

Besides which, in some of the districts, which are, by law, within the system, the amount of circuit business exceeds the powers of a single judge of the Supreme Court, and thus the contemplated and theoretical benefits of the system are but imperfectly enjoyed even there.

It seems to be self-evident that there ought to be such a reformation of the circuits as to have them embrace all the States.

To accomplish this indispensable object, the exigency for which disturbs the interests of society more seriously, perhaps, than any other federal question of mere government-organization, several plans have been considered.

One is, to provide an additional number of judges of the Supreme Court; a part of them to transact the business in banc, at the seat of government, and a part to be detailed for circuit duty. But as all the justices, so appointed, would possess an equality of right as such, and as the power of the Supreme Court is a constitutional power, it is not easy to see how a distinctive classification could be established by law, so as to exclude any of them from the regular business of the Supreme Court. And, if such a classification could be permanently enacted, or any means of compulsory self-classification provided, the result would be a fluctuating tribunal, with all the evils of unsettled decision. Besides which, if such a plan were adopted and found impracticable, it would be impossible to recede from it without leaving an excessive number of judges of the Supreme Court; because those judges are not removable by legislation. But the constitutional objection to this plan seems insuperable. Congress may, undoubtedly, enact a quorum of the court, of any number, however small; but it cannot exclude a member of it from participation in its action under the Constitution.

Another plan is to relieve the judges of the Supreme Court of their circuit duty; to reduce the number of the judges of that court as vacancies occur; to re-arrange all the districts of the United States in proper circuits; and to appoint a circuit judge for each circuit.

This plan has the advantages of simplicity and of involving little or no change in the forms of legal business, and the times and places in which it is to be conducted.

This plan is, undoubtedly, also more conformable than the present arrangement to the spirit and theory of the Constitution; because the Supreme Court is created by the Constitution, while the circuit courts are of those "inferior courts" which Congress has the power to ordain and establish; for which reason it has been much questioned whether the two things be not constitutionally incompatible:—and the judges of the Supreme Court are only appointed and commissioned as such.

On the other hand, it is forcibly urged that contemporaneous exposition of the Constitution, the practice under it, and long acquiescence in that practice, have served to sanction the existing law in this respect; that *nisi prius* duty is valuable as mental discipline to a judge; and that it is exceedingly inconvenient, in a political sense, to separate the judges from immediate intercourse with the people of the respective States.

Another plan has, therefore, been proposed, which is to rearrange the circuits so as to comprehend all the districts in all the States; to enlarge the jurisdiction of the district courts relatively to the circuit courts, and that of the circuit courts relatively to the Supreme Court; to have a circuit court holden at one place only, in each circuit, for all the districts composing it; and to constitute that circuit court of one judge of the Supreme Court and all the district judges within it.

This plan supposes, moreover, that all the original civil jurisdiction of the circuit courts, whether concurrent or exclusive, be taken away from them, and vested in the respective district courts; and thus all the criminal business will be confined to the district courts, because of the provisions of the Constitution, which require the trial of crimes to be in the State and district where the crime shall have been committed.

To this idea it is objected that it will greatly increase the expenses of litigation in all the States, except those few in which the court is holden; that it will, as to many of the circuits, give rise to insoluble controversy concerning which State shall be the seat of the circuit court; that the judges of

the district courts have not been appointed as for the unaided exercise of all the present original jurisdiction of the circuit courts; that the proper performance by them of the proposed new duties will, especially in the maritime States, interfere with their appropriate admiralty and other district duties; and that, in other respects, the plan will disturb the interests, and affect, inconveniently, the sensibilities, of the different States.

A fourth plan is, after re-arranging the circuits, to leave the circuit courts to be holden as at present in each district with a justice of the Supreme Court as a member by law of the circuit court, devolving the whole of the original business of that court, whether civil or criminal, upon the district judge as in the third plan, and all the appellate business in equity and fact; and requiring only writs of error, exceptions, and appeals in matter of law, to be heard in presence of the justice of the Supreme Court.

This plan is subject, in a still greater degree, to one class of the objections to the preceding one, namely, that of augmenting unduly the labor and responsibility of the district judges, who were not appointed in view of such large and exclusive functions.

Besides which, each of these two last-named plans, while enlarging the geographical range of the circuit duty of the judges of the Supreme Court, would not in reality give them correspondent relief in other respects, which the public interest requires, in order that they may have time for the discharge of the higher inevitable duties of the Supreme Court.

This consideration acquires additional weight from the fact that the new territories, which the United States have acquired by treaty with foreign powers, devolve, of late years, a vast amount of special duty on the Supreme Court, in the adjudication of land claims from the former provinces of Louisiana and Florida, and especially from California.

In regard to California, and the three other States at least, which are soon to exist on the Pacific side of the Union, it is difficult to see how any plan is to be carried into effect, requiring judges of the Supreme Court to hold circuit courts there; and very grave objections arise to the maintenance of a pecu-

Courts of the United States.

liar and anomalous organization of the courts in the Pacific States, and the continued exclusion of them from the general judicial system of the Union.

In this relation, there is another important class of considerations.

When Congress came to perform, as regards the judicial system, the legislative duty devolved upon it by the Constitution, it established proper subdivisions of the system, and organized them fitly upon the subsisting facts, but did not so arrange the details as to be fully capable of adaptation to successive changes in the amount of judicial business and in the number of the States.

At first, two judges of the Supreme Court were to attend each circuit court. But this arrangement was very soon found to be impracticable, and only one justice of the Supreme Court was required to attend. This also proving inconvenient, circuit judges were appointed; but that plan failed, by reason, in part, of the new judges being appointed in the last moments of an expiring administration; and the pre-existing arrangement was restored. But in doing this, Congress felt itself compelled to provide that either of the judges, namely, the justice of the Supreme Court alone, or the district judge alone, might hold the circuit court; but, if held by the district judge alone, he could not decide a case of writ of error or appeal from the district court; and all such cases have had to go over until another term and the attendance of a justice of the Supreme Court. Here, therefore, the system began to lose its unity and symmetry of proportions, even before the occurrence of any considerable augmentation of the number of States. But, when these began to increase, the system broke down altogether; and it became necessary to erect district after district, excluded altogether from the circuit organization. Thus we have the complicated evil, first of many circuit courts which are so in name only, and not in truth, consisting of the district judge sitting alone in the absence of a justice of the Supreme Court; and of many districts in which there is no circuit court proper. This anomaly must grow more grievous every day in presence of the great expansion recently impressed on the Union.

On the other hand, if circuit judges be appointed, then the adaptation of the system to new States becomes an easy and an ordinary fact. As each new State comes in, it has only to be adjoined to a circuit: or where a group of new States shall have been formed, it may be readily constituted into a new circuit. Thus the judicial system would expand itself naturally with the increase of the number of the States, without leaving any of the present gaps or breaks in the system, or producing the slightest disturbance of interests in any other part of the Union.

The present elements of organization, maintained in their present proportions, are incapable of adaptation to the old States, in which the augmentation of business, acting both on the Supreme Court and on the circuit courts, renders it materially impossible that the present duty of both should be performed by the present justices of the Supreme Court. Thus comes necessary violation in fact of the legal theory as to the relative jurisdiction of both circuit and district courts, the aggregate amount of that violation increasing daily with the population and wealth of the old States.

The same elements are also incapable of adaptation to the new States even as they now are, and that incapacity of adaptation becomes more flagrant every day as these States grow in population and wealth, and it is aggravated with each accession to the Union of an additional new State.

The consequence is, the gradual but sure development of two distinct judicial systems in the country, with a broad line of demarcation between them: one, in which a justice of the Supreme Court intervenes, either actually or nominally, in the business of the circuits, and the circuit courts dispose of more or less of the appeals from the district courts; and another, in which no justice of the Supreme Court appears on the circuit, either by the letter of law or in fact, and appeals go directly from the district courts to the Supreme Court, swelling, of course, the amount of business in the latter. These consequences are mischievous in practice, besides marring the hypothetical excellence of the system in its political relation to the States.

To avoid these evils, and to provide for the equal administra-

tion of justice in all parts of the Union, and to have the circuit business everywhere, both in fact and in law, in the present or in any other form of organization, performed by justices of the Supreme Court unaided and alone, and to expand the system from time to time as the Union expands by the aggregation of new States,—to effect all these combined results, continual additions must be made to the number of the justices of the Supreme Court, which thus becomes transformed irresistibly from a court into a senate.

On these premises, the considerations of public welfare, and of regard for the equal rights of the States, involved in the question of so modifying the details of the judicial system of the United States as to give it universality of application, and uniformity and efficaciousness in all parts of the Union, far outweigh any possible objections to such modification.

Undoubtedly it is desirable, so far as it is materially possible, to have the justices of the Supreme Court continue to be radiated, by local residence and by official relation, in the respective States. The general sense of this it is, which has obstructed the introduction of proper improvements in the judicial system. It seems to me that the time has arrived to meet the question frankly, rather than to continue an organization of the circuits, which goes on by temporary expedients, imperfectly applied to the newly arising wants of the public service; an organization in which the circuit courts are, by theory but not by law, required to be held by some person other than the district judge, or in which though the presence of some judge other than the district judge is contemplated by law, it is of course imperfectly had, in consequence of the increased amount of that portion of public business, which must by constitutional necessity be discharged by the Supreme Court.

A change is felt on all hands to be desirable, if not necessary. And there is a form of experimental change which can easily be made, and easily returned from if it fail to receive the public confidence on trial; which, in my judgment, unites most of the advantages, and avoids the disadvantages, of either of the other plans; which does not involve any complex legislation; and which is respectfully proposed as a solution of the problem.

It is to have, at present, nine, and prospectively, ten circuits; to rearrange the existing nine circuits, so as to comprehend within them all the judicial districts except those of California; to appoint nine assistant circuit judges, one for each circuit; to preserve unimpaired the jurisdiction of the circuit courts, in all the districts, as well those now within the circuits as those without; to withdraw the circuit powers from the district judges, and revest them in the proper circuit court exclusively; to have the ordinary circuit court holden as it is in each judicial district, and composed of the justice of the Supreme Court residing in the circuit, as now, but to associate with him an assistant circuit judge, so that the court shall be holden by a justice of the Supreme Court and the assistant circuit judge, or either of them, instead of the district judge, the latter being left to his proper district duties, and there being a real and effective circuit court even in case of the necessary occasional absence of the justice of the Supreme Court.

This plan furnishes the additional personal force requisite for the prompt dispatch of the enlarged judicial business of the country. It does not, so far as the suitors and the public at large are concerned, derange any of the relations of judicial business. It calls for no present enlargement of the number of judges of the Supreme Court. It secures unity of system by giving a proper circuit court to all the districts. It retains untouched the place of business of the circuit courts and of the district courts, each to be holden, as now, within their appropriate States. It makes competent provision to have the circuit business performed in fact, as well as in theory, by a circuit judge, and thus effectually cures the great defect of the existing organization. It continues the justices of the Supreme Court in the practice of immediate contact with the people of the States, but relieves them by law from the disagreeable necessity of seeing themselves constrained, from time to time, either to leave much of the circuit business unperformed or performed only by the district judge, or else to fail in the complete discharge of the proper duties of the Supreme Court.

This plan leaves California only with a mere district organi-

zation, and assumes that at a day not distant a tenth circuit shall be constituted of Pacific States.

The innovation proposed is the least possible:—beyond the restoration, as far as may be, of the normal functions of the respective courts, which is reparation rather than change, it consists of nothing but the provision of more persons to do the work necessary to be done, by the appointment of assistant circuit judges to divide the circuit business with the judges of the Supreme Court.

Permit me, in conclusion, in order to corroborate the opinion that some change should be attempted, to call to mind the trite, but not less cogent consideration, that the general interests of society at large, in time of peace, are but indirectly or lightly affected by the political action of government; while its judicial action is vital, actually or contingently, to the interests of all men. Their property, their honor, their lives, are constantly dependent on the wisdom and the virtue of the courts of justice. To guard and preserve these our dearest rights, we need, not only a magistracy of competent character, but also one of competent organization. And certain it is, that the existing judicial organization is altogether insufficient for the obvious necessities of the people even of the present United States.

I have abstained from remark as to the courts of the Territories and of the District of Columbia, which are established under other clauses of the Constitution than those herein considered, and which are not presumed to be within the purview of the resolutions of the two Houses. It may, however, be not improper to say here, that the legal condition of the District of Columbia, still regulated by the laws of Maryland as they stood half a century ago, without material legislative improvement during that period of time, and with recognised defects in its judicial organization, calls loudly for some action on the part of Congress.

I have the honor to be, very respectfully, your obedient servant,

C. CUSHING.

To the PRESIDENT.

Demurrage.

DEMURRAGE.

Demurrage may be either *ex contractu* or *ex delicto*: in either case it is a recompense fixed upon the deliberate consideration of all the circumstances attending the usual earnings and expenditures of a ship in common voyages; and has reference to her expenses, such as wages and provisions, wear and tear, and common employment.

In the case of delay of a ship employed in the transportation of troops for the United States, under circumstances which would be demurrage in ordinary contracts of affreightment, the Secretary of War may allow compensation in the nature of demurrage or by implied contract of the Department.

ATTORNEY GENERAL'S OFFICE,

February 9, 1854.

SIR: I have examined the question presented by your letter of the 1st of August, 1853, growing out of the contract made between the Pacific Mail Steamship Company and the United States, on the 3d of July, 1852, for the transportation of the Fourth Regiment of Infantry from the port of New York to that of Benicia by way of the Isthmus of Panama: reply to which has been delayed by my occupations in the Supreme Court.

It appears that the Steamer *Golden Gate*, destined by the company for the conveyance of the troops from Panama, was, by reason thereof, detained a certain time at Panama, for which detention the company claim compensation from the United States.

On carefully revising the great mass of documents accompanying your letter, it is perceived that the claim was referred to my predecessor (the Hon. J. J. Crittenden) by the late Secretary of War, (the Hon. C. M. Conrad,) and that he expressed the opinion that the company are entitled to compensation in the premises, payable out of the money appropriated by Congress, as for additional expense, costs and charges of transportation; and that the Secretary of War came to the same conclusion, reserving only the question as to the amount of compensation to be allowed.

In the opinion of Mr. Crittenden, and the decision of Mr. Conrad, this contemplated allowance is spoken of as "demurrage."

Now, upon this state of the record, you submit for my opinion, in the case,—Whether demurrage should be allowed according

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to the view of Mr. Secretary Conrad, or the actual expenses incurred, or whether some other measure of compensation should be adopted, or whether there be no legal claim to "indemnity."

The concluding part of the inquiry is, in my opinion, to be taken as *res judicata*. The Attorney General, on formal reference, decided that the company is lawfully entitled to something, and that decision was adopted by the Secretary of War; and the only question then is, whether that decided point shall be reopened by me.

I think a formal and deliberate decision of the proper department of the Government should not be reconsidered without grave cause. "Else," as well said by Mr. Attorney General Legare, "nothing would ever be settled, and the departments would have no time for anything but reviewing the decisions of the past, while their own decisions, subject to a like treatment, would only add to the uncertainty and confusion they were intended to remedy."

Undoubtedly, one Attorney General has the power to review an opinion of his predecessor or himself, as one Secretary of War has the power, unless vested rights have intervened, to reconsider a decision of a preceding Secretary, or of his own. So a court may reverse the previous opinion of itself or of previous judges on a question of law, on being satisfied of its erroneousness; or may, in the exercise of a wise discretion, grant a new trial or a review, where the rules of law and the purposes of justice require it. And the action of the courts of law and equity in this relation seems to me to afford a safe and proper rule for the guidance of the executive and administrative departments of the United States.

Is, then, anything here presented, upon which a court of law could grant a new trial, or a court of equity entertain a bill of review? I think not.

The Secretary of War decided this point, by the advice of the Attorney General, on the same grounds of facts, which are now presented to me in your letter as the bases of my inquiries, namely, "that the detention of the vessel was for the public interest, and caused expense to the company."

Moreover, in looking into the voluminous body of documentary

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evidence filed in the case, it seems to me that the conclusion formed by you as to the material grounds of fact is correct, and that a jury of the country would have to say that the detention "was for the public interest and caused expense to the company."

It is true, controversy exists as to the precise history of the series of events terminating in, or producing, the detention,—and the relative responsibility, either of the United States or the company, in the successive stages of these events;—and the Quarter Master General, for whose conclusions I am accustomed to entertain respect, differs in these parts of the case from the company.

But there is one great fact in the case, which looms up over all points of controversy. It is, that the primary and overpowering cause of any detention, the *causa causans*, was the visitation of God in the form of malignant cholera, which defeated all the purposes and calculations both of the company and of the United States.

In the face of this dread calamity, which drove the subordinate employés of the company from their duty, which attacked and decimated the troops, which diffused a panic terror all over the Isthmus, the superior agents of the company on the one hand, and the officers of the Army on the other, made the best they could of the disastrous circumstances surrounding them; and this, undoubtedly, at much expense and loss to the company as well as to the United States.

If, under such calamitous circumstances, any errors of judgment in regard to minor details should, on a scrupulous investigation of the facts, appear to have been committed on either side, such possible error should not affect the judgment of the United States injuriously to the company.

I do not perceive any sufficient reason to retry the questions of fact.

As to the question of law, I think it would be more accurate to speak of the allowance to the company as *compensation in the nature of demurrage*, rather than demurrage.

Demurrage, in the legal sense, is either the delay of a

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chartered vessel by the charterer, or the indemnity for that delay.

The Supreme Court has decided that demurrage may be either *ex contractu* or *ex delicto*. In either case, it is a recompense fixed upon "the deliberate consideration of all the circumstances attending the usual earnings and expenditures in common voyages." And the allowance or compensation thus made for the detention of a vessel, has "reference to the ship's expenses, wear and tear, and common employment." (The Apollon, ix Wheaton, 377, 378.)

Here, there is no claim on the United States as for the tortious detention of the Golden Gate. But the late Attorney General adjudged that there was claim for demurrage, meaning, of course, as *ex contractu*.

I think, on the facts as presented to me, this opinion, with some qualification as to the force of the term "demurrage," is well founded. Compensation is to be allowed equitably, on implied contract, by reason of the expense and the loss to which the company were subjected, in consequence of the act of God interrupting the regular execution of their contract with the United States. It is not damages to the company for a wrong done by the United States, but implied contract for new or additional service, and as such payable out of the proper appropriations for transportation at the disposal of the Department.

There is a decision apparently to the contrary of this conclusion, in New York; (Robertson v. Bethune, iii Johnson, 342.) But the court was divided: and the dissentient opinion in the case, by Mr. Justice Spencer, seems to me most conformable to justice, and to other adjudications of analogous questions in Great Britain and the United States.

In thus remarking on the decision of Mr. Crittenden and of Mr. Conrad, and giving the reason why that decision should not be revised, I have anticipated much of what needs to be said as to the other two points submitted for my consideration, namely, whether demurrage shall be allowed to the company, or the actual expenses incurred, or what other measure of compensation shall be adopted.

 Relation of Attorney General to the Departments.

The rule in admiralty has been cited from the case of the *Apollon*, as laid down by Mr. Justice Story. It is *fair compensation*, nothing more nor less, measured by mercantile usage as to indemnity, having reference to expenses, and loss of employment. Or, as put by Mr. Justice Spencer, it is made up of various items, such as the wages and provisions of the crew, the wear and tear of vessel, and loss of employment during the detention.

These are questions of fact, to be settled as such, according to mercantile usage, so as equitably to compensate the company as upon a new contract, and at the same time protect the interests of the Treasury against any exorbitant demand; and this the Department may effectually do, because the company cannot sue the United States.

I am, very respectfully,

C. CUSHING.

Hon. JEFFERSON DAVIS,
Secretary of War.

 RELATION OF ATTORNEY GENERAL TO THE DEPARTMENTS.

No appeal lies from the decision of the Commissioner of Pensions or other officer of the Government, to the Attorney General.

ATTORNEY GENERAL'S OFFICE,
February 11, 1854.

SIR: I have received your letter of the 4th ultimo, suggesting an appeal to me from a decision of the Commissioner of Pensions.

You err in supposing that any such right of appeal exists, in case of dissatisfaction of parties at a decision of the public officers.

The duty of the Attorney General, in this relation, is to give advice, when called upon, to the President, the Heads of Department, and the Solicitor of the Treasury.

Those officers decide hundreds of questions every day. If
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all these decisions were subject to appeal, the effect would be to block up the whole business of Government.

When either of those officers, in the course of business, entertains serious doubt as to the law involved in any matter before him, he, for the satisfaction of his own conscience, and for the purpose of right judgment, seeks advice of the Attorney General.

But there is no law authorizing or allowing appeals to the Attorney General.

I am, very respectfully,

C. CUSHING.

EUSEBIUS WESTON, Esq.

EXTRADITION OF FUGITIVES FROM JUSTICE.

Where a marshal of the United States has in custody a fugitive from foreign justice under warrant of extradition from the proper authorities of the United States, and a State court undertakes to usurp jurisdiction of the case, it is the duty of the marshal, disregarding any process of the State court, to take the party to the exterior line of such State, and there deliver him to the agent of the foreign government.

ATTORNEY GENERAL'S OFFICE,
February 13, 1854.

SIR: I have received your note of this date, referring a communication from Mr. O'Connor, the District Attorney of the Southern District of New York, by which it appears that application has been made to the Supreme Court of the State of New York for a warrant by which the person of Alexander Heilbron, a fugitive from the justice of Great Britain, now in the hands of the marshal of the United States, with the final authority of the President for his extradition, may be taken from the British agent after being delivered to him by the marshal.

While it is very desirable that the question of jurisdiction in conflict between the courts of the United States and those of New York, in the cases of this class, should be settled by the Supreme Court of the United States, yet an issue on the person of the British agent would be less convenient, than if made on

Copyright Convention with Great Britain.

the marshal; and, unless Mr. O'Connor can see his way clearly through the possible stages of the controversy, if the proposed warrant should be issued by the State court, I advise that the marshal be instructed to anticipate such warrant by quietly conducting Heilbron either to a vessel or to the line of the State, and there delivering him up to the British agent.

I am, very respectfully,

C. CUSHING.

Hon. R. McCLELLAND,
Secretary of the Interior.

COPYRIGHT CONVENTION WITH GREAT BRITAIN.

A treaty, constitutionally concluded and ratified, abrogates whatever law of any one of the States may be inconsistent therewith.

(Sembler) A treaty, assuming it to be made conformably to the Constitution in substance and form, has the effect, under the general doctrine that "*leges posteriores priores contrarias abrogant*," of repealing all pre-existing federal law in conflict with it, whether unwritten as law of nations or admiralty, or written as legislative statutes.

At any rate, if the effect of a treaty on existing statutes admit of doubt, Congress never has failed to pass the acts requisite to give effect to any treaty not containing provisions incompatible with the Constitution.

Such provisions of the proposed convention between the United States and Great Britain on the subject of copyright, as are inconsistent with existing provisions of acts of Congress, either abrogate the latter, or if not, on the ratification of the convention they will be repealed by Congress.

ATTORNEY GENERAL'S OFFICE,

February 16, 1854.

SIR: I have received your letter of the 9th instant, enclosing to me a communication from her Britannic Majesty's minister, Mr. Crampton, and submitting to me the question of law presented by that communication.

Mr. Crampton, referring to the convention between the United States and Great Britain on the subject of international copyright in works of science, literature, and art, signed on the 17th of February, 1853, and now before the Senate, suggests the question, upon the law of the United States of 3d February, 1831, which limits the right of property in works of this nature

to "persons being citizens of the United States or resident therein,"—"Whether, as the American law now stands, a real reciprocity would be insured by the convention to British subjects, or whether it would be necessary that a law of the United States Congress should be passed to that effect?"

This inquiry involves the consideration of the relation, by the Constitution and laws of the United States, of a treaty constitutionally concluded and ratified, to the ordinary statute and other forms and description of law existing in the United States; and the application of the principles deduced therefrom to the present Convention.

The Constitution of the United States, in Art. II., s. 2, granted to the President "the power by and with the advice and consent of the Senate to make treaties, provided two-thirds of the Senators concur." And it is declared by Art. VI., "This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

Now upon inspection of these provisions of the Constitution, it might, perhaps, suffice to say that, as the Constitution stipulates that British subjects shall have, within the United States, the rights, and capacities, and privileges of enjoying and exercising their property of copyright mentioned in the convention, and as the convention, if duly ratified between the two nations, will become, by the Constitution of the United States, a supreme law, obligatory everywhere within the United States, binding on all, a rule of decision for all judges, whether of the United States or of the several States, or of the Territorial Governments, therefore the convention is and must be, during its continuance, competent and sufficient, *proprio vigore*, to confer on and secure to British subjects a right to all the capacities, privileges, and property, which are the objects and intent of the convention.

The convention being a contract between the two nations, duly entered into, and ratified by the President of the United

States, by and with the advice and consent of the Senate, it thereby is a law of the United States, without any further action by the Government of the United States. No act of Congress is necessary to create or perfect the *vinculum juris*. The stipulations of the convention operate as a law to the courts of justice, State and Federal; they are of a character to operate of themselves as constitutionally obligatory, without the aid of any legislation by Congress. Such is the effect of the Constitution of the United States.

A treaty, it is true, though it be as such a portion of the supreme law of the land, yet may require the enactment of a statute to regulate the details of a process or of a right, embraced in its stipulations; but such necessity, if it exists, does not affect the question of the legal force of the treaty *per se*.

1. A treaty, constitutionally concluded and ratified, abrogates whatever law of any one of the States may be inconsistent therewith.

The decision of the Supreme Court in the case of *Devisee of Fairfax v. Lessee of Hunter*, (vii Cranch, 627,) giving effect to the ninth article of the treaty of 1794, between the United States and Great Britain; that of the same court in the case of *Ware v. Hylton*, (iii Dallas, 242, 244, 250, 266, 280, 284;) that of Mr. Justice Washington, in the case of the *Lessee of Gordon v. Halliday*, (i Washington's C. C. R. 291;) and that of Mr. Justice Livingston, in the case of *Doe on dem. of Fisher v. Harnden*, (i Paine's C. C. R. 59;) are examples showing the efficacy of treaties made by the United States, in their relation to the prior laws, or even the constitutions, of the several States.

2. A treaty, assuming it to be made conformably to the Constitution, in substance and form, has the effect of repealing, under the general conditions of the legal doctrine that "*leges posteriores priores contrarias abrogant*," all pre-existing federal law in conflict with it,—whether unwritten, as law of nations, of admiralty, and common law,—or written, as acts of Congress.

This point has also been adjudged, though indirectly, by the Supreme Court, in the case of the schooner *Peggy*, (i Cranch, 109.) The *Peggy*, a French armed vessel, was captured on

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24th April, 1800, by the ship Trumbull, commissioned and authorized by the President of the United States, was libelled as lawful prize, under an act of Congress, in the District Court of the United States for Connecticut; upon appeal by the United States and the captors, the officers and crew of the privateer Trumbull, to the Circuit Court of the United States, the Peggy was condemned as lawful prize, by sentence pronounced 23d September, 1800; and from this sentence of condemnation, the claimant of the Peggy appealed to the Supreme Court of the United States.

Pending the suit in that court, the convention between the United States and France stipulating that "Property captured and not yet *definitely* condemned, or which may be captured before the exchange of ratifications, shall be mutually restored, contraband goods destined to an enemy's port excepted," was signed on 18th February, 1801; ratifications were exchanged on 31st July, 1801, with a proviso accepted on 21st December, 1801; and on that day the treaty was promulgated by the proclamation of the President of the United States. The effect of this treaty upon the act of Congress of the United States of 7th July, 1798; on the capture under it made 24th April, 1800; on the condemnation of the 23d September, 1800; and upon the pending appeal involving the rights of the captors and the captured,—were questions of law directly involved.

Upon the facts the Court said:

"The Constitution of the United States declares a treaty to be the supreme law of the land. Of consequence, its obligation on the courts of the United States must be admitted * * Where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights, and is as much to be regarded by the court as an act of Congress. * * * * *

"It is the general rule that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes, and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of

that no doubt has been expressed in the present case, I know of no court which can contest its obligation.

"It is true that, in mere private cases between individuals, a court will and ought to struggle hard against a construction, which will, by a retrospective operation, affect the rights of parties, but in great national concerns * * the contract * * ought always to receive a construction conforming to its manifest import."

The court gave effect to the treaty, setting aside the judgment of condemnation, "rightful when rendered, but which cannot be affirmed but in violation of law," that is, without a breach of the treaty with France.

Another illustration of the doctrine occurs in the legal effect of the 7th article of the treaty between the United States and France of the 4th of July, 1831, which stipulates as follows:

"The wines of France, from and after the exchange of the ratifications of the present convention, shall be admitted to consumption in the States of the Union at duties which shall not exceed the following rates, by the gallon, (such as it is used at present for wines in the United States,) to wit, six cents for red wines in casks; ten cents for white wines in casks; and twenty-two cents for wines of all sorts in bottles." (viii Stat. at Large, p. 432.)

This treaty was ratified, and the ratifications were exchanged on the 2d of February, 1832, at which time the duty on the wines of France, as fixed by the act of Congress of the 24th of May, 1828, (iv Stat. at Large, p. 309,) was, for red wines in casks ten cents per gallon, other wines in casks fifteen cents per gallon, and on wines in bottles thirty cents per gallon in addition to the duty on the bottles.

These wines became chargeable at once with the lower duty; and on the next revision of the tariff, by the act of July 14th, 1832, the rates of duty on French wines stipulated for by the treaty were enacted in due form by Congress. (iv Stat. at Large, p. 589.)

3. A treaty, though complete in itself, and the unquestioned law of the land, may be inexecutable, without the aid of an act of Congress: in which case Congress has never failed to

enact the requisite laws, and so to recognise and to perform the duty imposed on it by the Constitution.

Numerous illustrations of this might be given ; of which a few will suffice.

The treaty between the United States and France of the 30th of April, 1803, and that with the Mexican Republic of the 2d of February, 1848, each stipulated for the payment of large sums of money in consideration of cessions of territory made to the United States, by the governments of France and Mexico, respectively ; the payment of such money required appropriations by Congress ; and they were of course made.

Another class of cases, is of treaties with foreign powers comprehending the payment of indemnities to citizens of the United States, to be adjudicated and distributed in a particular way, calling for legislation on the part of Congress. Such are the treaty with Spain, of February 22d, 1819 ; that with Denmark, of March 28th, 1830 ; that with France, of July 4th, 1831 ; that with the Two Sicilies, of October 14th, 1832 ; and sundry others, which it is needless to enumerate.

Many other examples of the same fact might be given, in regard to all which the constitutional obligation has been discussed and freely admitted at successive epochs in the history of the United States.

If, which is not to be anticipated, Congress refuse to pass the laws which might be requisite for the execution of a treaty, it would be the case of a treaty violated on the part of the United States, and of course no longer obligatory on the other party.

Congress has, indeed, in one instance, expressly pronounced a treaty or treaties to be null and void. I refer to the act of July 7th, 1798, which declares that the existing treaties with France (those of 1778) are no longer obligatory on the United States. (i Stat. at Large, p. 578.)

But this act of Congress belongs to a different class of considerations ; it being of the same nature with the proclamation of the President of the United States, of the 22d of April, 1793, having relation to the same treaties. (Amer. State Papers, Foreign Affairs, vol. i, p. 140.)

These are acts of national sovereignty with regard to treaties

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of the same category with acts of war, being the deliberate and intended refusal to execute a treaty for good cause, or the declaration of the nullity thereof for like good cause, with acceptance of the consequences of such acts according to the received rules and usages of the international law of Christendom.

Upon principle, therefore, as well as upon the authority of precedents, judicial and administrative, my opinion is that the right of property or copyright of British subjects to be exercised in the United States, according to the convention in question, and a real reciprocity in that matter, are secured by the treaty, (provided it shall be ratified,) by its own force as a supreme law of the United States.

If any legislation be necessary to give complete effect to the convention, we are to assume that Congress will make it in due season; until which time, of course, the treaty would be in the same condition as a treaty requiring executive acts for its consummation, such as the evacuation of territory by hostile forces, or the surrender of ships of war or fortified places, at the conclusion of a war.

Whether any legislation be necessary or not, depends on the conditions of the treaty compared with the provisions of the existing law pertinent to the subject-matter.

The existing copyright law of the United States is the act of Congress of February 3d, 1831, revising and consolidating former laws. (Curtis on Copyright, p. 82.)

By the first and other sections of the act, copyright is conditionally secured to any person *being a citizen of the United States or resident therein*. (iv Stat at Large, p. 436.)

Undoubtedly the first article of the convention, which Mr. Crampton refers to, considered in the light of the acts of Parliament *in pari materia*, would have the legal effect of so far repealing or modifying the first section of the act of Congress, as to annul anything therein, which might be construed otherwise to deprive a British subject in the United States of the rights defined by the convention, which a citizen of the United States may by law exercise in Great Britain.

There is no difficulty, therefore, as to the question of *right*, whether upon the letter of the convention or the constitutional prin-

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ciples hereinbefore explained. But the question of *remedies* to secure and enforce those rights is a different and independent one.

It depends on the fourth article of the convention, which is in the following words:

“In the event of an infraction of the provisions of the foregoing articles, the pirated works or articles shall be dealt with in each country according to the laws which now exist, or may hereafter exist in that country in respect to such works or articles; and the person who may have committed such infraction shall be liable in each country to the penalties and actions which are or may be prescribed by the laws of that country for such offences, committed in respect of a work of home origin.”

Upon this article, the question is, whether the action of debt for infringement of copyright, provided for in the 6th section of the act of 1831,—the forfeiture and penalties enacted in the 7th and 11th sections,—and the remedy by action on the case and by injunction of the 9th section,—are in such terms of enactment, that, notwithstanding the phrases of exclusion from copyright of persons not citizens of, or resident in the United States in the 1st, 8th, 9th, or other sections of the act, those various provisions would, by force of the convention, be so modified and amended as to become applicable to non-resident subjects of Great Britain?

If the provisions of the first and fourth articles of the treaty were contained in an act of Congress, they would, in my opinion, according to all the rules of statute construction, operate as a repeal *pro tanto* of the adverse provisions of the act of 1831, so as, that is, to confer on British subjects, not only the rights, but also the remedies of our own law, under all those conditions in which the corresponding rights and remedies are enjoyed by Americans in Great Britain.

I think the stipulations of the convention have a legal effect fully tantamount to that of a new legislative provision in the same terms; and therefore that no new act of Congress is “necessary” to insure a real reciprocity in the premises to subjects of Great Britain.

But if, in the sequel, judicial exposition should serve to show that the executory provisions of law, as modified by the terms

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of the convention, are insufficient to accomplish and satisfy its whole object and intent, then it is not to be doubted that any law, necessary for the purpose, would be duly enacted by Congress.

I am, very respectfully,

C. CUSHING.

Hon. WILLIAM L. MARCY,
Secretary of State.

FEES OF DISTRICT ATTORNEYS.

The provisions of the act of 1853, regulating the fees of District Attorneys of the United States, and prohibiting the receipt of any fees except such as are therein specified, do not necessarily apply to services of a District Attorney in the courts of one of the States.

Special fees, for counsel in the business of any one of the Departments, are chargeable to the proper fund of such Department, and not to the judiciary fund.

ATTORNEY GENERAL'S OFFICE,

February 18, 1854.

SIR: I have received your letter of the 16th, referring to a prior communication of the 27th of June last, on the subject of the services of William F. Joynes, Esq., in the suit of French v. Bankhead.

Mr. Joynes having been District Attorney of the United States for the Eastern District of Virginia at the time of his retainer in this case, the question of his compensation for services therein has been somewhat embarrassed by the very stringent provisions of the act of 26th February, 1853, entitled "An act to regulate the fees and costs to be allowed clerks, marshals, and attorneys of the Circuit and District Courts of the United States, and for other purposes."

This act provides that, in lieu of the compensation previously allowed by law to District Attorneys of the United States, "the following, (that is, the fees enumerated in the act,) and no other compensation, shall be taxed and allowed;" after which the law proceeds to say: "But this act shall not be construed to prohibit attorneys, &c. from charging to and receiving from their clients, other than the Government, such reasonable compensation for their services, in addition to the taxable costs,

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as may be in accordance with general usage in their respective States, or may be agreed upon between the parties."

The statute is retroactive in its terms: it declares that no District Attorney "shall receive any other or greater compensation for any services rendered by him than is provided in this act," and it repeals all provisions of law allowing any other or greater fees.

The act also purports to apply to suits in which the United States are "concerned."

Finally, the act provides that if any District Attorney (or other officer named in the act) "shall, by reason or color of his office, wilfully and corruptly demand and receive any other or greater fees than those allowed in this act," he shall be subject to indictment for a misdemeanor, punishable by fine and imprisonment.

Now, the compensation claimed by Mr. Joynes being other and greater than that allowed by the act, the question is, of the legality of the claim.

On the best consideration, however, which it has been in my power to give to that act, it seems to me that the various provisions thereof limiting the compensation of District Attorneys, apply only to cases in which the District Attorney is performing an official duty as such in the courts of the United States.

While some of the provisions, such as the permission to District Attorneys to receive agreed or other reasonable fees "from their clients other than the Government,"—the prohibition of greater fees to them "for any services rendered" the Government, the provision as to suits in which the Government is "concerned," and other general phrases of the act, would seem to lead to one conclusion,—yet all just consideration of the duties of a District Attorney, and of his relation to the Government, in addition to the phrases of the law which assume that the fees which it provides for are to be "taxed," and which define the misdemeanor to be for a District Attorney to "wilfully and corruptly demand and receive" other compensation "by reason or color of his office," lead to another conclusion, namely,—that already intimated, of the purview of the act being confined to suits in which the District Attorney appears officially, in which the United

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States are concerned, and which are litigated in the courts of the United States.

The case of *French v. Bankhead*, involving indirectly the title of the United States to some part of the land at Old Point Comfort, in Virginia, on which are the public works at Fortress Monroe, is pending in the courts of that State, and Mr. Joynes did not appear there in the performance of an official duty as District Attorney, but on a special retainer of the War Department.

I think, therefore, that he is entitled to reasonable compensation in the premises, for such amount as, having reference to the magnitude of the interests at stake, and the importance of the service rendered, may be agreed between him and the War Department, in whose discretion the question rests, it being the case of "services of counsel rendered at the request of the Head of a Department." (Acts of 1852-3, p. 162.)

Such was the construction of the pre-existing law on this point. (Mr. Wirt's opinion, ante, vol. i, p. 385; and Mr. Crittenden's opinion, ante, vol. v, p. 261).

I have no occasion to say anything on this point, except that, from the correspondence and other evidence in the case, it appears that the services of Mr. Joynes in the premises have been of great importance to the public interests, and therefore deserve the liberal consideration of the Government.

As to that part of your letter of the 16th, which suggests your being advised that the account of Mr. Joynes is "chargeable to the appropriation for judicial expenses," permit me to say that the compensation paid to James Lyons, Esq., for similar services in this case, was charged to, and paid out of the appropriations for contingencies of fortification; and this corresponds with the understanding of such matters entertained by the First and Second Comptrollers, namely, that counsel specially retained for extra official services arising in the business of any of the Departments, are uniformly paid, not from the judiciary fund, but from appropriate funds in charge of the particular Department, at the order of which the services were performed.

I am, very respectfully,

C. CUSHING.

Hon. JEFFERSON DAVIS,
Secretary of War,

Reclamation of Fugitives from Service.

RECLAMATION OF FUGITIVES FROM SERVICE IN UNORGANIZED TERRITORIES.

The constitutional right of a citizen of the United States to reclaim a fugitive from his lawful service extends, not only to the States, and to the organized Territories, but also to all the unorganized territorial possessions of the United States.

If, in such Territory, there be no Commissioner of the United States to act, the claimant may proceed by recaption without judicial process.

Any such fugitive from service in the Indian country is there unlawfully, and as an intruder is subject to arrest by the executive authority of the United States.

Such fugitive cannot be protected from extradition by any Indian tribe or nation; for the Indians are themselves the mere subjects of the United States, and have no power in conflict with the Constitution of the United States.

By the local law of the organized political communities of the Cherokees, Choctaws, and Chickasaws there is ample provision for the delivery up of fugitives from service in any of the States.

ATTORNEY GENERAL'S OFFICE,
February 18, 1854.

SIR: I have considered the application of Mr. John B. Davis, of the State of Mississippi, and the papers accompanying the same, requesting the aid of the Government in the reclamation of certain fugitives from his service, who are said to be at this time in the country of the Choctaw nation, west of the river Mississippi.

These documents raise the question as to the right and power of a citizen of the United States to reclaim fugitives from labor, who may be found in that portion of the territory of the United States, which lies without the limits of any State or any organized Territory.

The Constitution, Art. IV., Section 1 and 2, provides as follows:

"Sec. 1. Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

"Sec. 2. The citizens of each State shall be entitled to all

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the privileges and immunities of citizens in the several States.

“A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

“No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.”

The two clauses of the second section are in *pari materia*, and mutually illustrate each other, and in express terms apply only to fugitives, either from justice or service, who may escape from one State into another State, and all of the quoted sections of the Article are in their express terms applicable only to States.

Now, could it have been the intention of the Constitution that faith should be given only to the public acts, records, and judicial proceedings of States, or to those of States only in States? Clearly not. Could the Constitution have intended to reserve and exclude from extradition either fugitives from a Territory or fugitives into a Territory? Clearly not.

The legislative exposition of the different clauses of the second section of the Article is explicit on this point; for the act of March 27th, 1804, (ii Stat. at Large, 299,) applies “as well to the public acts, records, office-books, judicial proceedings, courts, and offices of the respective Territories of the United States, and countries subject to the jurisdiction of the United States, as to the public acts, &c., of the several States;” and the act of February 12th, 1793, authorizes the reclamation of fugitives either from justice or service, whether escaping from, or escaping into “any of the United States or either of the Territories on the north-west or south of the river Ohio,” that is to say, the whole of the then territorial surface of the United States.

The constitutionality of the last-named act, in all its material

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parts, has been solemnly affirmed by the Supreme Court. (*Prigg v. The Commonwealth of Pennsylvania*, xvi Peters, 539.)

That the word "State," in the fourth article of the Constitution, possesses, in some of its relations, a meaning broader than its apparent or usual signification, is obvious from other provisions of the Constitution.

Thus, in section 4th of this Article, the Constitution says: "The United States shall guaranty to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the Executive, when the legislature cannot be convened, against domestic violence." Do these guarantees apply to the *States* only? Assuredly not: they apply to the people of the United States, whether existing in States complete, or inchoate States, called Territories.

I do not mean to be understood as affirming that the word "State" in the Constitution, wherever it occurs, comprehends, also, Territories. Of course it does not; for States alone have Senators and Representatives in Congress, and they alone appoint electors of President.

The Constitution does not give complete equality of privileges and immunities to the citizens of the States and Territories; because the 3d section of the same article vests in Congress certain specific powers touching the territory of the United States; in virtue of which provision its jurisdiction in a Territory differs from its jurisdiction in a State; for the latter has unequivocally the benefit of all the general provisions of the Constitution, and the former has not. (*American Ins. Co. v. Three hundred and fifty-six Bales of Cotton*, i Peters, 1542.)

Thus, it has been adjudged that Congress may by law exclude the citizen of a Territory from suing as such in the Courts of the United States. (*Corp. of New Orleans v. Winter*, i Wheaton, 90.) The court might well say, however, in another case, (*Hepburn v. Ellzey*, ii Cranch, 445,) that it is "extraordinary" that the courts of the United States, while open to aliens, should be closed against the citizens of a Territory. For the equality of title in "privileges and immunities," which

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the Constitution speaks of, are designed, beyond peradventure, to comprehend all citizens of the United States, whether dwelling in Virginia or in the North-west Territory, in Maine or in Oregon, subject only to such necessary limitations as the territorial condition might require for the common good of the whole Union.

In conferring on Congress the particular power in question, the Constitution makes use of very notable phraseology. "The Congress shall have power to dispose of, and make all needful rules and regulations respecting, the territory or other property of the United States." *The territory or other property.* These words are not descriptive of persons, of citizens of the United States. They speak of "territory and other property." *Power to dispose of.* That cannot apply to citizens of the United States. *Make all needful rules and regulations respecting.* The same expressions appear in another part of the Constitution; and are not the language appropriate to the description of ordinary legislative functions. Citizens of the United States and their rights are not to be *disposed of*, nor to be treated as *property*, nor governed by mere *rules and regulations*, whether in Territories or States.

The whole truth seems to be, that, according to the principles of the Constitution, the people of the States are self-constituent, and in them resides all theoretical sovereignty. Citizens of the United States, residing in the Territories, possess all the great rights which belonged to them as citizens of their respective States. They compose the elements of a future sovereignty, existing on earth, which is, for the time being, the "property" of the Federal Union. Congress must, of necessity, have and exercise the power "to dispose of, and make rules and regulations respecting" this property of the Union, including among other things the power to subdivide unorganized territory, and purchase it for settlement and organization. But the general powers of municipal legislation pass at once by virtue of the general principles of the Constitution to the citizens of the United States in the organized Territory; in subordination of course to the guiding spirit of our political system, which is, to combine liberty with legality, to advance from the starting point

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of the agreed conditions and limits of the Constitution. The inhabitants of a Territory, whether commencing, pursuing, or consummating the successive stages of self-government, remain subject always to the restrictions of the Constitution. In fine, the letter of the Constitution wherever it is applicable, and the spirit of it in all things, is to be applied to the consideration of the rights of citizens of the United States in the Territories as well as in the States.

Considered as property only, any Territory of the United States is the common property of all the States; considered as a political society, any such Territory has a portion of the powers of a people, but possesses none, which are outside of, or beyond, or incompatible with, the Constitution.

In whatever degree, therefore, the citizens of Territories have less of power than the citizens of States, the fact cannot work to the detriment or diminution of the constitutional rights of the States.

Hence, to bring these doctrines to the specific point of discussion, as a State has a right to demand of another State the extradition of fugitives from either justice or service, *a fortiori*, a State has the right of demanding this from a Territory, which does not yet possess all the powers of federative sovereignty, and receives its delimitation and its incipient organization at the hands of the pre-existing members of the Union.

When the Constitution expressly provided for extradition as between the States, in so doing it recognised the fact, that the States were sovereign, and that extradition is not a matter of strict right, but of express convention, or otherwise of comity only. (Wheaton's Elements, p. 171, 172.) The States conceded this, one to the other, in their common interests. Hence the language of the Constitution. There was no need to say this expressly in regard to territory out of the States, that being the common domain of the Union.

I assume, therefore, that the rights of all citizens of the United States in this relation, so far as the Constitution reaches them, are protected by it, whether in or out of the limits of the States.

Accordingly, as we have seen, the act of 1793 applies in

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express terms to all the then territorial surface of the United States; and the act of September 18th, 1850, in amendment of, and supplementary to, the act of 1793, is in express terms applicable to "any State or Territory of the United States."

And there is the strongest possible confirmation of this view in the provision of the act of March 6th, 1820, which assumes to prohibit the future existence of slavery in all that part of the French Territory of Louisiana which lies north of the latitude of thirty-six degrees and thirty minutes; but does that under proviso of the right of reclaiming any person escaping into said limits, from whom labor or service is lawfully claimed, in any State or Territory of the United States. *A fortiori*, such person may be claimed in any other part of the French Territory of Louisiana. (iii Stat. at Large, p. 548.)

I think, therefore, that my predecessor, Mr. Attorney General Butler, (Opinion of August 30th, 1838,) in assuming that the two extradition-sections of the Constitution were "evidently intended to refer exclusively to those portions of the Union which are duly organized as separate States," erred; or at least he erred in assuming that this insulated consideration disposes of the question, and therefore that extradition, either of fugitives from justice, or of fugitives from service, cannot be obtained from a Territory, unless there be legislation by Congress on the subject; and that, therefore, the President has no power in the premises.

Congress, it is conceded by Mr. Butler, has the power to provide for extradition from Territories, whether organized or unorganized, and it has in effect done so, except that it has not, in precise reference to the very case, defined the instrumentality to be employed for this purpose in unorganized territory; and, therefore, it is inferred, existing laws do not reach the emergency, which is to be considered as a *casus omissus* in the legislation of Congress under those clauses which regulate the *status* of the Indians.

Much misapprehension has arisen as to all our relations with the Indians by the traditional designation of "nation" as applied to their tribes, and of "treaty" as applied to our dealings with them. The Indians of the United States are not

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“nations” in the modern political sense of the term, employed as indicating a sovereign state; nor is a treaty, between them and us, the act of sovereign with sovereign. We are sovereign, they subject. As communities, they are under our government; as individuals, they are the pupils and wards of the United States.

Of course, the Choctaws, or any other Indians, cannot have rights in derogation of those of the United States. The country, which they occupy, can claim no exemption from the scope of the Constitution.

True, we have, by the treaty of Dancing Rabbit Creek, secured to the Choctaws the jurisdiction and government of persons and property within their limits, and the possession of the lands assigned to them, and the right to make laws for their own government,—but all this under positive reservation of the Constitution and laws of the United States, and especially of the ordinary legislation of Congress regarding Indians. There is nothing in the treaty to contradict the general conclusion already reached by indication of constitutional principles, that neither the country of the Choctaws, nor any right in it, is placed above the Constitution.

Accordingly, Congress has legislated repeatedly in regard to the Territories in question, exercising jurisdiction there, particularly in whatever concerns citizens of the United States, and their rights, whenever it seemed to be required by the public interests of the Union. Signal examples of this are visible in various provisions of the acts to regulate trade and intercourse with the Indians, to secure peace on the frontiers, and to punish crimes in the countries still occupied by Indians; those countries being for sundry legal purposes annexed to the adjoining States of Missouri and Arkansas.

At this stage of the inquiry, therefore, but one difficulty remains, and that is, to determine the particular agency, by which to reclaim a fugitive from service in the country of the Choctaws. There is ample express provision by existing laws and treaties for the arrest of criminals in that region; but no specific provision regarding fugitives from service, except such as are found in the acts of 1793 and 1850.

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Those acts expressly provide that when a person, held to service in any State or Territory of the United States, has heretofore, or shall hereafter have, escaped into another State or Territory of the United States, the person, to whom such service is due, may pursue, and by himself or his agent, seize and arrest, such fugitive.

There can be no doubt as to the legal effect of these provisions. They have been construed by the Supreme Court of Massachusetts, which, after the fullest argument and consideration, adjudged that the statute of 1793 empowers the party, entitled to the service of a fugitive, to seize him without a warrant, even within the limits of a State. (*Commonwealth v. Griffith*, ii Pick. 11.) The same doctrine was afterwards affirmed by the Supreme Court of the United States. (*Prigg v. The Commonwealth of Pennsylvania*, xvi Peters, 539, 561.)

Indeed, the rule is a general one, by the common law, that a husband, father, or master may lawfully retake his wife, child, or servant, wherever he happens to find them unlawfully separated from him, so that the recaption be not in a riotous manner, nor attended with breach of the peace. (iii Black. p. 4.)

The assumed absence of any constituted tribunals of the United States, in the country of the Choctaws, to wit, judges, magistrates, or commissioners, renders inoperative, it has been supposed, in the present case, the general right of reclamation as set forth in the act of Congress. I say the "assumed absence;" for it is by no means clear that such a matter, occurring in the Choctaw nation, does not come within the jurisdiction of a proper commissioner of the courts of the United States.

But, if this be not so, there is the right of recaption already spoken of.

Besides which, the right of reclamation here is a right under the Constitution. The right does not the less exist, in the absence of any legislative provisions to aid in its exercise. And, in a correspondent case, that of extradition under treaty with foreign powers, it has been adjudged that it may be effected without an act of Congress. (*The British Prisoners*, i

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Woodb. & M., p. 66.) Legislative instrumentality is convenient, but it is not indispensable, to the efficacy of a complete and positive command of the Constitution.

But all embarrassment on this point is removed by referring to another class of considerations, not embraced in the view of Mr. Attorney General Butler.

In the first place, it is to be remembered that the country in question is part of the province of Louisiana, ceded by France to the United States. It lies to the south of the line prescribed by the 8th section of the act of March 6th, 1820; and whatever be the constitutional effect of that provision of law, if it possess any, it cannot prejudice a right growing out of the relation of master and servant in the territory occupied by the Choctaws.

Now, the laws in force in Louisiana, at the time of its cession, were those of Spain, (*Beard v. Poydras*, iv Martin, 368; *Berluchaux v. Berluchaux*, vii Louis. Rep., 544,) which maintained the relation of master and servant, with right of reclamation in the United States. (*Partida Cuarta*, tit. xxi, *De los Siervos*, *passim*; *Escriche*, *sub voc.* *Esclavitud*.) After the acquisition of Louisiana, it became, in the outset, the territory either of Orleans or of Louisiana, retaining still in substance, and at any rate in this respect, the law of Spain.

When Louisiana was admitted into the Union, the country now occupied by the Choctaws remained a part of the Territory of Missouri. On the admission of Missouri, it fell within the Territory of Arkansas. Subsequently, the State of Arkansas came into the Union with its present limits, leaving the country to the west of it, as it now is, in the relation of territorial organization. Through all these changes the local law of the successive Territories of Louisiana, Missouri, and Arkansas continued the same, so far as regards the present question; and that law was not repealed, but remained in force as to all the country it previously covered, notwithstanding the separation of Arkansas, and the omission of Congress to form of the residue an organized Territory.

In the second place, the constitution of the Choctaw nation recognises the distinction between freemen and slaves, (Art. ii.,

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sec. 1 and 11; Art. vii., sec. 4, 11, and 16;) and their laws forbid "the harboring of runaway slaves," (Constitution and Laws of the Choctaw nation, p. 36,) and also declare that no negro from the United States shall be allowed to come and remain in the Nation. (Ibid. p. 46.) Moreover, the "Act Runaway Negroes" provides that "it shall be the duty of any one in this nation to take up a negro whom he may suspect as a runaway;" that any person apprehending a runaway, "shall give the owner, when he is known, information by the earliest opportunity;" and it is required of the clerk of the district, in which any runaway may be taken up, when "it appears that such runaway is from any of the United States," to advertise the fact in some newspaper "of such State." (Ibid. p. 28, 29.)

That is to say, the laws of the Choctaw nation provide for the apprehension and extradition of fugitives from service; and any such fugitive from service due to a citizen of the United States, exists there "contrary to law,"—not only to the law of the United States, but also to the law of the Choctaw nation.

Now, the ninth section of the act of June 30th, 1834, ch. 161, provides that "the Superintendent of Indian Affairs, and Indian agents, or sub-agents, shall have authority to remove from the Indian country all persons found therein contrary to law; and the President of the United States is authorized to direct the military force to be employed in such removal;" and the thirteenth section directs that the person so removed shall be conveyed to the nearest civil authority, (of the United States,) there to be proceeded against according to law." (iv Stat. at Large, p. 730, 731.) These provisions are sufficient, in my opinion, to call to action here, within suitably guarded limits, the authority of our executive officers in the Choctaw nation.

The treaty of Dancing Rabbit Creek conceded to the Choctaws a government of their own, for themselves and their descendants; it secured the exclusive right of self-legislation to their national councils; but all this, as heretofore intimated, subject to a condition, analogous to that which a State imposes when giving qualified legislative powers of internal administration to a city, namely, that the laws of the Choctaw nation shall be "not inconsistent with the Constitution, treaties, and

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laws of the United States," (Art. iv;) with assurance of all the relative rights of person and property as between citizens of the United States and them, (Art. vi., ix., xii. ;) with express engagement that "all intruders shall be removed from the Choctaw nation and kept without it," (Art. xii. ;) the United States explicitly reserving to itself legislative jurisdiction as to the Choctaws "to the extent that Congress, under the Constitution, are required to exercise legislation over Indian affairs," (Art. iv. ;) and the United States engaging to protect the Choctaws from domestic strife and foreign enemies on the same principles that the citizens of the United States are protected," (Art. v.) All these provisions of the treaty mark the subordinate political condition of the Choctaws, in common with all other Indians, as the Supreme Court have judicially defined it in the particular case of the Cherokees. (v Peters, p. 1.)

Accordingly, the Choctaws do not pretend that such rights as they may have are to conflict with our superior rights. On the contrary, their laws are, as, to have any legal force whatever, they must be, in accordance with ours. They freely tender to us the means of exercising our own rights in their country. And it would be a singular condition of things, indeed, if, when the Choctaw nation thus invite a citizen of the United States to go there, and exercise a right belonging to him indubitably as such, he must in the meanwhile be treated as out of the pale of the protection of his own Government. No such anomalous fact exists, or can exist, within the broad boundaries of these United States.

Besides which, under the Constitution and laws of the Choctaw nation, there is an adequate political organization, with executive, judicial, and ministerial officers proper for the discharge of any legal duty, which may be required of them, by the Agent of the United States, or any citizen of the United States, conformably to the Constitution and laws of the American Union.

I conclude, therefore, that existing laws are fully competent to the exigencies of the present case; that a person reclaiming a fugitive from service in the Indian country, in addition to the legal rights which he possesses in the States and organized Ter-

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ritories, has the right here, which he has not there, of calling on the President, if need be, to give direction in the premises to the proper authorities of Government.

When this question was under consideration on a former occasion, the War Department, after stating, on the opinion of the Attorney General, that the laws confer on the Executive no authority to direct the apprehension of runaway slaves, and that "it is not competent for the Department to interpose in that mode," proceeded to direct the Choctaw Agent, and the commandant of Fort Gibson, to exert their "personal and official influence with the Choctaws," and lend their aid to accomplish the object. The conclusion does not attach itself, with much distinctness of cohesion, to the premises, which seem to exclude any lawful interposition. But the order was, nevertheless, in substance, a legal one, according to the views which I have submitted, to the effect that a citizen of one of the States has the constitutional and legal right to pursue a fugitive from service into a Territory, whether organized or unorganized; that the constitution and laws of the Choctaw nation correspond to those of the United States in this respect; and that any such fugitive being in the Indian country unlawfully, it is made the duty of the President by law to direct the employment of public force, if necessary, for the purpose of removing such person, that he may be dealt with, as to law and right shall appertain, in the State where he belongs.

The documents exhibited by Mr. Davis are adequate *prima facie* evidence of his rights. If any adversary rights exist, either on the part of any other citizen claiming property in the slaves by prescription, or on the part of themselves claiming to be freemen, that question must be determined by the courts of law.

Mr. Davis or his agent may lawfully, in my opinion, repair to the Choctaw nation to reclaim any person or persons, who owe to him service by the laws of Mississippi, and they are to be delivered up to him on his claim, by the Choctaw nation, in pursuance of our law and of theirs; and if he meet with any obstacles in the exercise of this right, he may lawfully receive

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the aid of the United States, to effect the apprehension of persons unlawfully being in the Choctaw Nation.

I am, with the highest respect,

C. CUSHING.

The PRESIDENT.

DEPOSIT OF PUBLIC FUNDS.

An agent of the Government cannot require it to receive the credit of a bank, or any other third party, in the place of that of himself and his sureties.

A bank cannot lawfully take public funds which had been deposited with it, knowing them to be such, and divert them from a public debt to the payment of the private debt of the public agent, or to a debt contracted by him in violation of law and of his duty to the Government.

A debtor, in paying money to a bank, has the right to prescribe to which of two existing debts it shall be credited.

Where a disbursing agent of the United States had paid public money into a bank, the Government will not undertake to settle incidental matters of controversy between him and the bank, but leaves all such questions to the courts of justice.

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ATTORNEY GENERAL'S OFFICE,

February 27, 1854.

SIR: I have received your communication of the 14th inst., transmitting to me correspondence and other documents appertaining to and explaining a certain receipt held by Mr. Perrin, late Navy Agent at Memphis, and requesting my opinion whether it "can be considered as a legal voucher in the settlement of his accounts?"

The receipt, which is signed by James Penn, cashier of the Planters' Bank, is in the following words:

"Received the within five thousand dollars of Captain Bragg, which has been placed to the credit of E. O. Perrin, Navy Agent—\$5000.

'Dec. 15th, 1852.

JAMES PENN, Cashier."

It would be impossible to say that this receipt, considered by itself, and without explanatory evidence, is of right to be treated as a voucher in the settlement of the official accounts of Mr. Perrin.

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Whatever public money he received from the Department at any time, he could apply only to public disbursements with which he might be charged. He could not lawfully deposit the same in any bank. In settling with the Department, he cannot substitute the credit of the bank for any balance due from him to the Government. Nay, independently of any question as to deposits in a bank, no agent of the Government can require it to receive the credit of a third person in the place of that of himself and his sureties, unless he had committed the public funds to such person in the course of his official duty, for the discharge of public engagements and contracts, or otherwise in obedience to the lawful direction of the Government.

But, on examining the correspondence and other papers to which my attention is called for the better understanding of the transaction, it is found that the bank held at the time a liquidated demand against the Government, due to one Saffarans, and assigned by him to the bank, for the payment of which, funds were transmitted to Mr. Perrin by the Department; and Mr. Perrin alleges, and offers evidence to prove, that he ordered the said five thousand dollars to be paid into the bank on account, and in part discharge, of the demand of Mr. Saffarans; and that if this intention do not distinctly appear in the receipt, that is the fault of his clerk, who, in his absence, paid the money and took imperfect voucher from the bank.

On the other hand, the bank, through its cashier, Mr. Penn, claims, either of right or with consent of Mr. Perrin, to apply this money to some other and previous transaction between itself and him, and now presents the entire Saffarans demand to the Department, and asks payment of its whole amount as for a debt on which nothing has been paid, and which is therefore due to the bank as the lawful assignee of Saffarans.

Here, then, is a question of mere fact, which being lawfully determined, no question of law remains.

If the five thousand dollars were in fact paid to the bank by Mr. Perrin to the account of the Saffarans demand, then that demand is discharged *pro tanto*, it is good against the Government for the balance only, and Mr. Perrin is entitled to the allowance of five thousand dollars, in his account as Navy

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Agent; in which case, the receipt would be, not evidence of a deposit, but evidence in part of a cash payment lawfully made in behalf of the Government.

On the other hand, if either by previous direction, contemporaneous intention, or subsequent authorization, Mr. Perrin can be shown, as the bank alleges, to have paid in the money at large, not applied to any public debt, and as a mere deposit, then he cannot claim to have it allowed as a voucher at the Department.

This primary question of fact involves some secondary ones.

As Mr. Penn's receipt is given to Mr. Perrin in his capacity of Navy Agent, the bank could, of course, have no lawful right to apply the money to any private, that is, unofficial, account or debt of Mr. Perrin.

If the bank held a plurality of lawful demands against the Government, or against Mr. Perrin, officially, it might, if not otherwise directed, elect to which of its demands it should credit a general payment by him. But if a debtor owe two separate bills or notes to the same person, he may, undoubtedly, in paying a sum of money, prescribe to which of the notes or bills the payment shall be credited; and the creditor has no right to change the prescribed destination of the payment. If an election was in this case left to the bank, by the act or intention of Mr. Perrin, still the payment must go to the discharge of some official and lawful demand on Mr. Perrin as Navy Agent.

In fact, the bank exhibits what purports to be an account current between it and the Navy Agent, in which he is charged, *under one date, that of November 6th, 1852*, with:

1. "Drafts of Saffarans for \$9856, which is nearly the the amount of their demands on the Department, assigned to the bank.

2. "Navy Yard bill, A. Oberly, \$1367," which is a subject of controversy between the bank and Mr. Perrin, but is of relation, incidentally only, to the present question.

3. "E. O. Perrin's check for \$1771, and \$94."

4. The following items, viz: "Navy bills checked out by E. O. Perrin in *June*, \$6395.34 cents, less amount to credit E. O. Perrin, \$4.94—\$6390.40."

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"Navy Yard Bill checked out by E. O. Perrin, July, \$184.40 cents."

The Navy Agent is credited in the same account as follows:

1. "Dec. 15. By deposit by H. A. Bragg, \$5000," which is the subject of the receipt.

2. "Dec. 31. By deposit by E. O. Perrin, Navy Agent, \$3424."

3. "By balance \$11,239," which is the amount of the two bills, of Saffarans and Oberly, claimed by the bank of the Department.

Now, the bank alleges that the sum of \$3424 credited in this account, and which exactly balances it, was paid by Mr. Perrin with knowledge of the destination given by the bank to the \$5000 receipted for, and with recognition of that destination.

On the other hand, Mr. Perrin denies this; he alleges that the account as it stands, with its balance exactly paid, is a forced and a false one; that it is made up in omission of antecedent and relevant items; that it consists of improper admixture and confusion of his official and his unofficial acts; that the sum of \$3424 was to meet other, and specific items of the true account; and he disputes the items of navy bills purporting to be checked out in June and July, and yet charged in gross, without specification of particulars, and out of time chronologically, under the later date of November.

Here, then, is a series of disputed facts, the determination of which, in my view of the legal relations of the subject, is material to the solution of the general question.

For, assuming, *argumenti gratia*, that the \$5000 payment is not to be explained by any evidence dehors the writing itself, and therefore that it was a general payment on account, still it is by its tenor "to be placed to the credit of E. O. Perrin, Navy Agent." Nothing else of Government debt, to which it could be lawfully applied, appears in the account, except the Saffarans' matter, unless it be the post-entered items in gross of navy bills checked out in June and July; explanation of which entry is necessary, and a liquidation of its contents, so as to show that they are chargeable to the Government, before it can

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be seen whether the bank had lawful power to credit against them a payment which by its express tenor could be placed only to the official credit of the Navy Agent.

These remarks are not made in the intention of assuming that in the transactions between the bank and Mr. Perrin, there was anything unlawful as respects the conduct of the latter.

If, however, the incomplete explanation, which the bank gives, of its anterior dealings with Mr. Perrin, are to be understood as implying that those dealings were in violation of his duty as Navy Agent, then, as the bank participated therein, it has no more claim on the consideration of the Government in the premises than has the Navy Agent. It is well for banks, not less than disbursing agents of the Government, to understand this. A bank cannot lawfully take public funds, knowing them to be such, and divert them from a public debt to the payment of the private debt of the public agent, or to a debt contracted by him in violation of law, and of his duty to the Government.

What is the whole fact, in regard to the matter in issue, it does not distinctly appear from the papers before me; and so far as they are explicit on material points, they involve a conflict of testimony, which the Attorney General has neither means nor power to determine.

The Government is under no obligation to run the risk of in effect paying this \$5000 twice, as it might have to do, if, without full inquiry, it should assume either side of the controversy between the Navy Agent and the bank. Neither of the parties has a right to call on the Department to settle their difficulties for them.

I advise, therefore, that the payment of the demand of the bank as assignee of Saffarans, and also the final decision on the accounts of Mr. Perrin, be suspended or deferred, for additional investigation, in such forms of law as to the Department may appear most consonant with justice and with the rights and interests of the United States.

I am, very respectfully,

C. CUSHING.

Hon. JAMES C. DOBBIN,
Secretary of the Navy.

Clerks of the Patent Office.

CLERKS OF THE PATENT OFFICE.

The salaries of all clerks in the Patent Office, like its other expenditures, are to be defrayed out of the Patent Fund.

ATTORNEY GENERAL'S OFFICE,

March 4, 1854.

SIR: I have received your communication of the 16th of January, enclosing one from the Commissioner of Patents, which presents a question as to the co-relation of the several acts of Congress, touching the payment of the salaries of the clerks employed in the Patent Office.

It is provided by the 9th section of the act of 4th July, 1836, (v Stat. at Large, p. 121,) "the moneys received into the Treasury under this act shall constitute a fund for the payment of the salaries of the officers and clerks herein provided for, and all other expenses of the Patent Office, and to be called the Patent Fund."

By sect. 14 of the act in addition to the above, passed 3d March, 1837, (v Stat. at Large, pp. 194-195,) it is enacted "that all moneys paid into the Treasury of the United States for patents, and for fees for copies furnished by the Superintendent of the Patent Office, prior to the passage of the act to which this is additional, shall be carried to the credit of the Patent Fund created by said act; and the moneys constituting said fund shall be, and the same are hereby appropriated for the payment of the salaries of the officers and clerks provided for by said act and all other expenditures provided for by this act; and for such other purposes as are or may be hereafter specially provided for by law. And the Commissioner is hereby authorized to draw upon said fund from time to time, for such sums as shall be necessary to carry into effect the provisions of this act, governed, however, by the limitations herein contained."

It is undeniable that this last act makes, in terms, a permanent appropriation of the specific revenues arising from the Patent Office to the precise object of the expenses of the office, including, among other things, the payment of the salaries of the clerks and other persons employed in the office.

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But, in the act making appropriation for the civil and diplomatic expenses of the Government, for the year ending 30th June, 1854, approved 3d March, 1853, (Session Acts, by Little & B. chap. 97,) it is enacted, in sect. 3, that the clerks in the Treasury, War, Navy, the Interior, and the Post Office, shall be arranged into classes. No. 1, to receive an annual salary of \$900 each,—No. 2, an annual salary of \$1200 each,—No. 3, an annual salary of \$1500 each,—and No. 4, an annual salary of \$1800 each,—from and after the 30th of June then next. Besides the increase of salaries so enacted, the number of clerks was also modified. And it is in that section enacted, "That the clerks, when distributed and arranged as required by this section, shall be paid according to its provisions out of any money in the Treasury not otherwise appropriated, and shall constitute the whole of the permanent clerical force of the Departments of the Treasury, War, Navy, the Interior, and the Post Office, with the exception of the Census Bureau."

Upon these several acts, the question is, whether the salaries of clerks in the Patent Office are to continue to be paid out of the particular fund of the office.

It might, perhaps, suffice to reply that the language of the act of 1853 does not, in any respect, make new provisions of any sort as to the fund out of which the salaries of the clerks of the Patent Office are to be paid. The words are: "The clerks, when distributed and arranged as required by this section, shall be paid according to its provisions out of any money in the Treasury not otherwise appropriated." Now, the fund of the Patent Office is not *otherwise* appropriated. Nay, it is by permanent law specifically appropriated to this among other objects. I do not, therefore, on the mere inspection of the provisions of the act of 1853, collated with those of the act of 1837, perceive any reason to doubt that the clerks in the Patent Office, as newly arranged and classified, are to continue to receive their salaries from the *spécial* fund of that office.

Whatever of misapprehension there may be upon this point, seems to have arisen from an erroneous construction, heretofore, of the provisions of the act of August 31st, 1852, (Session Acts, by Little & Brown, p. 97, chap. 108, sect. 2,) which gave to

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"the clerks, messengers, watchmen, and laborers employed at an annual salary, or in temporary positions, in the Executive and Legislative Departments of the Government in the city of Washington, whose annual compensation does not exceed twelve hundred dollars, * * * an increased compensation of twenty-per cent.;" and to those whose compensation shall exceed \$1200, and be less than \$1600, "an additional compensation of ten per cent. upon the amount of their salaries: Provided that no salary shall be increased to more than sixteen hundred dollars by the per cent. or additional compensation herein provided for, and that the same be paid out of any money in the Treasury not otherwise appropriated."

This section was contained in the act appropriating money for the civil and diplomatic expenses of the Government, for the year ending 30th June, 1850; and,—as the increased compensation thus newly created was not, and could not have been, included in the estimates furnished by the Departments,—if the appropriation contained in this section for payment of the increased compensation had not been made, there would have been a deficiency of appropriation to meet the increased salaries and compensations as to all except the clerks, messengers, watchmen, and laborers employed in the Patent Office; for whom the specific appropriation of the particular revenues of the Patent Office, called the "Patent Fund," had been previously made by the before-mentioned permanent provisions of acts of Congress.

In the letter of the Commissioner of Patents, it is stated that the increased compensation by way of per centage, allowed by the act of 1852, has been paid to the clerks of the Patent Office, not out of the Patent Office funds as plainly directed by the acts of 1836 and 1837, but out of some other funds of the Treasury. Why? I cannot see. Was not the fund of the Patent Office funds in the Treasury "not otherwise appropriated" than to the payment, among other things, of the salaries, whether less or more in amount, of the clerks and messengers of that office?

There can be no satisfactory answer to this, except in assuming that the general and permanent provisions of the acts

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of 1836 and 1837, concerning the funds out of which the salaries of clerks in the Patent Office are to be paid, were repealed as to the per centage of addition to salary in the act of 1852, by the language of that act; and, if so, it might well be assumed that the provisions of the acts of 1836 and 1837 were repealed, as to the whole amount of salary, by the correspondent language of the act of 1853 before cited. It may be desirable, therefore, to consider the question of repeal.

There is nothing in the act of 1853, which expressly repeals the acts of 1836 and 1837 in this respect. If there be repeal, it must be repeal by repugnancy of provisions or by implication.

It is perfectly well settled that a subsequent statute does not repeal a former one, without a repealing clause, or negative words, or manifest repugnancy of matter. (*Beale v. Hale*, iv Howard, 37.)

To work a repeal of a former statute by implication, that implication must be necessary; "It is not sufficient to establish that subsequent laws cover some or even all of the cases provided for by the former; for they may be merely affirmative, or cumulative, or auxiliary. There must be a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed, by implication, only *pro tanto*, to the extent of the repugnancy." (*Wood v. The United States*, xvi Peters, 362-363. *Daness v. Fairbairn*, iii Howard, 646.)

It is self-evident that the generality of clerks comprehended in the 2d section of the act of 1852, and 14th section of the act of 1853, had no claim whatever to be paid out of the Patent Office fund, and that, as to such, it was necessary to appropriate by law the money wherewith they should be paid, inasmuch as, by the 9th section of the first Article of the Constitution of the United States,—“No money shall be drawn from the public treasury, but in consequence of appropriations made by law.” It is equally evident that if the provision, for paying the increased compensations, and for paying the increased number of clerks in the several Departments, “out of any money in the Treasury not otherwise appropriated,” had been omitted in the act of 1853,

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there would have been a deficiency of appropriation for the year ending 30th June, 1854, except as to such clerks as were by law to be paid out of the "Patent Fund," because, as before remarked, the increased number of clerks, and the increased compensations had not been included in the estimates furnished for the necessary appropriations for the financial year ending on the 30th June, 1854.

As to the appropriation of the "Patent Fund" by the act of 1837, to pay the clerks of the Patent Office, and the appropriations for the year ending on the 30th June, 1854, contained in the 3d section of the act of 31 August, 1853, for paying those clerks, there was no repugnance, during the financial year ending 30th June, 1853 and 1854 respectively. On that subject the act of 1837 and the act of 1853 would be auxiliary and commutative, not repugnant.

The act of 1837, appropriating the Patent Fund, is permanent. The appropriation by the act of 3d March, 1853, is only for the financial year ending 30th June, 1854; although the numbers and classifications of the clerks, thereby directed, are permanent. For the financial year ending 30th June, 1855, as to the clerks in all the Departments, except the clerks in the Patent Office, there must be estimates of the sums required for their compensations and appropriations by law for paying them, and so on from year to year.

But suppose appropriations to pay the clerks "out of any money in the Treasury not otherwise appropriated," contained in the 3d section of the act of 1853, be considered as not limited to the financial year ending 30th June, 1854, but a perpetual appropriation: still there is no repugnance between that and the specific appropriation of the "Patent Fund," contained in the 9th section of the act of 1836, (Vol. v, p. 121,) and 14th section of the act of 1837 (Vol. v, pp. 194-195,) they may all stand together; the general appropriation for payment "out of any money in the Treasury not otherwise appropriated," would but be auxiliary to the appropriation, for the same object, of the Patent Fund specifically pledged for paying the officers and clerks of the Patent Office.

Appropriations of moneys constituting different funds, arising

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from different sources of revenue to be received into the Treasury, for payment of the same debts against the United States, are not inconsistent, but cumulative and auxiliary; if the fund, specifically pledged, should fall short, the other general fund could be resorted to for the deficiency.

Let us recur to the language of the acts of 1836 and 1837. By the 3d section of the act of 1836, the moneys arising under that act to the Patent Office are to be accounted for quarterly to the Treasurer of the United States, and by the 9th section of that act "the moneys received into the Treasury under this act shall constitute a fund for the payment of the salaries of the officers and clerks herein provided for, and all other expenses of the Patent Office, and to be called the Patent Fund." And by the 14th section of the act of 3d March, 1837, that Patent Fund was increased by the application of funds accruing before the passage of the act of July 4th, 1836, and specifically appropriated "for the payment of the salaries of the officers and clerks provided for by said act and all other expenses of the Patent Office, including all the expenditures provided for by this act; and also for such other purposes as are or may be hereafter provided by law." Here is a fixed policy of the Government; a standing idea, with its appropriate reasons, pledging the Patent Funds in the Treasury for the payment of the expenses of the Patent Office.

In the first section of the act of 31st August, 1852, making appropriations for civil and diplomatic expenses of the Government, there are appropriations of specific sums for the payment of the compensations of the clerks, temporary clerks, and messengers in the Legislative Department, and in the Executive Departments of State, Treasury, Interior, War, Navy, Post Office, and the office of Attorney General; and, thereafter, in sect. 2, is the provision for the increased compensation to the clerks, messengers, &c., in the Executive and Legislative Departments in the City of Washington: "Provided, that no salary shall be increased to more than \$1600 by the per centum or additional compensation herein provided for, and that the same shall be paid out of any money in the Treasury not otherwise appropriated * * * Provided, that the increase of salary given by

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this section shall not extend beyond the present fiscal year without further legislation." I cannot discern, in this temporary appropriation for a single year, including the large number of clerks not belonging to the Patent Office, any trace of a purpose to repeal the settled, fixed, permanent policy in the acts of 1836 and 1837, of appropriating the Patent Fund for the payment of the salaries and other expenses of the Patent Office.

Indeed, Congress, so far from intending to repeal the appropriation of the Patent Fund for payment of the salaries of the officers and clerks of the Patent Office, in the same act of 1852, (p. 96,) made an addition to the compensation of the disbursing clerk and draughtsmen of the Patent Office, and added two clerks "to be paid out of the Patent Fund."

In the first section of the act of 1853, making appropriations for the civil and diplomatic expenses of the Government for the year ending 30th June, 1854, there are appropriations, as in the act of 1852, for paying the salaries and compensations of clerks and temporary clerks, messengers and laborers, estimated according to their existing salaries and rates of compensation; thereafter comes the third section for classifying and increasing the compensations of the clerks in the departments of Treasury, War, Navy, Interior and Post Office, and in the office of Commissioner of Pensions. "Provided that the clerks when distributed and arranged as required by the section shall be paid according to its provisions, out of any money in the Treasury not otherwise appropriated."

There is no inconsistency between this third section and the appropriations for paying the same clerks, contained in the first section of the same act. If the two sections of the same act be absolutely repugnant and totally inconsistent, then the latter section would repeal the former. (Dwarris on Statutes, p. 515; London Ed. of 1848.) But no one supposes that the third section repeals the appropriations of the first section for payment of the salaries of the clerks.

As to the clerks not belonging to the Patent Office, they cannot be paid, under the third section of this act of 1853, out of the Patent Fund, because it is money otherwise appropriated

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by the 9th section of the act of 1836, and the 14th section of the act of 1837.

The acts of 1836 and 1837 appropriate the Patent Fund for certain objects. It is money in the Treasury appropriated. There is no express repeal of the Patent Fund, in the act of 3d March, 1853, and nothing repugnant to, nor inconsistent with, the specific appropriation and pledge of the Patent Fund as contained in the acts of 1836 and 1837,—nothing which hints at the repeal of that pledge. We have already seen that the mention of “money in the Treasury not otherwise appropriated” does not divert the Patent Fund from the objects for which it is created and appropriated. To make the one or the other, or both, of the statutes of 1852 and 1853 work by implication a repeal of the 9th section of the act of 1836, and 14th section of the act of 1837, would be contrary to the established rules of statutory construction, to the plain import of the respective provisions, and to the legal meaning, as well as the undoubted intention, of the several acts of Congress.

My opinion, therefore, is, that the salaries of the clerks should, notwithstanding the act of 1853, nay, by the very force of the language of the act itself, continue to be paid, as required by the acts of 1836 and 1837, out of the special fund of the office.

I am, very respectfully,

C. CUSHING.

Hon. ROBERT McCLELLAND,
Secretary of the Interior.

OFFICE AND DUTIES OF ATTORNEY GENERAL.

Exposition of the constitution of the office of Attorney General as a branch of the executive administration of the United States.

ATTORNEY GENERAL'S OFFICE,
March 8, 1854.

SIR: At the expiration of a year's experience in the discharge of my present official duties, and observation of their

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relation to other branches of federal administration, it seems to me not unseasonable now to lay before you some suggestions of possible improvement in the manner of conducting the legal business of the Government.

The Constitution of the United States provides, that "the executive power shall be vested in the President of the United States," who shall be Commander-in-chief of the Army and Navy; who shall, by and with the advice and consent of the Senate, make treaties; who shall nominate and, by and with the advice and consent of the Senate, appoint, all officers of the United States, military, judicial, diplomatic, or administrative, whose appointments are not otherwise provided for, and which shall be established by law; who shall have a qualified participation in the enactment of laws, and take care that they be faithfully executed; and who shall, from time to time, give to Congress information of the state of the Union.

The President is thus made the responsible depository and chief functionary, for the time being, of the ministerial powers and administrative duties of the United States regarded as a political sovereignty.

But the Constitution does not specify the subordinate, ministerial, or administrative functionaries, by whose agency or counsels the details of the public business are to be transacted. It recognises the existence of such official agents and advisers, in saying, that the President "may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices;" and these officers are again recognised by the Constitution in the clause which vests the appointment of certain inferior officers "in the heads of departments;" and it leaves the number and the organization of those departments to be determined by Congress.

In the execution of this duty, the constitutional Congress proceeded, at an early day of its first session, (July 27, 1789,) to establish the Department of Foreign Affairs, with "a principal officer therein," to be called the Secretary for the Department of Foreign Affairs, and to perform and execute such duties respecting foreign affairs as the President should assign to him,

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and to conduct the business of the department in such manner as the President should, from time to time, order or instruct.

But this act, which was the commencement of the organization of executive departments under the Constitution, and a commencement in the direction of a systematic and proper distribution of duties, gave place, after the lapse of a few months, (September 15, 1789,) to an act, which changed the name of the Department of Foreign Affairs to that of Department of State, though it in no respect changed the duties of the Secretary, except to provide that he should receive, keep, and cause to be promulgated, the laws enacted by Congress; and that he should keep the seal of the United States, and affix the same to the commissions of all civil officers of the United States lawfully appointed by the President, whether with or without the advice and consent of the Senate.

In changing the name of this department from Foreign Affairs to that of State, Congress did not change the main duties of the department, consisting then, as now, of the charge of the foreign relations of the Government. There is no very obvious connexion between the new name given to the department, and the only important fact which accompanied the change, namely, the commitment of the seal of the United States to the secretary, and the duty of affixing it to the commissions of civil officers. If on this account, as it would seem, the designation of the Secretary was changed, certainly the new title had not, according to the received previous use of the term in our mother tongue, any special relation to the new duties, it not being coupled with the custody of the great seal in England, and being applied there to the office of several of the principal secretaries. Probably it was deemed convenient, in that early period, when the public business was little in amount relatively to later times, that the head of the most important of the departments should bear a name indicative of higher, general, and political duty, and so indefinite, that much miscellaneous business might be consigned to his charge, either by act of Congress, or by direction of the President.

Next, after establishing the Department of Foreign Affairs, Congress, at the same session, (August 7, 1789,) established the

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Department of War, with a principal officer therein, to be called the Secretary for the Department of War, and required to perform such duties as might from time to time be lawfully enjoined on or intrusted to him by the President, relative to military or naval affairs; and to conduct the business of the department in such manner as the President might from time to time order or instruct.

This department was also formed on proper premises of classification, even though including, as it did, the jurisdiction of Indian affairs; for the arrangement of frontier posts, and other considerations, devolved of necessity, at that period, the charge of the Indians on the Secretary of War.

Next came, at the same session, (September 2, 1789,) a Department of Treasury, (not *the* Treasury,) the head of it, however, being called the Secretary of the Treasury, and his general duty being defined to be to digest and prepare plans for the improvement and management of the revenue, and for the support of public credit; to prepare and report estimates of the public revenue and the public expenditures; to superintend the collection of the revenue; to grant warrants for money to be issued from the treasury in pursuance of appropriations by law; and to have charge of the sale of the lands belonging to the United States.

In the organization of the business of this department by this act, facts peculiar, as compared with the other two departments, are prominent.

One is, that the Secretary of the Treasury, instead of being made subject only to the direction of the President by name, is required "generally to perform all such services, relative to the finances, as he shall be directed to perform;" which phraseology has relation to the provision of the act, that he shall "make report and give information to either branch of the legislature, *in person or writing, as he may be required*, respecting all matters referred to him by the Senate or House of Representatives, or (and) which shall appertain to his office."

Another peculiarity of the act is, that whereas, in the others, provision is made for a chief and other clerks only, here, on the other hand, is the commencement of sub-departments, or bureaus, commonly so called, in the provision for the appointment of a

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comptroller, an auditor, a treasurer, and a register, among whom a portion of the business of the department is distributed permanently and upon system.

At the same session of Congress, in organizing the judicial business of the United States, (September 24, 1789) provision was made for an Attorney General, to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law, when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters which may concern their departments.

By another act of the same session of Congress, (September 22, 1789,) the office of Postmaster General was appointed, with an assistant, or clerk and deputies, subject, in performing the duties of his office, and in forming contracts for the transportation of the mail, to the direction of the President, but not in other respects then placed in the same high official relation to the Government as at the present time.

Such was the original basis of the executive organization of the Government. The Secretary of State for political and foreign affairs, the Secretary of War for military and naval matters, the Secretary of the Treasury for those of finance, and the Attorney General for legal and judicial ones, were the immediate superior ministerial officers of the President, and his constitutional counsellors during the whole period of the administration of Washington.

We find abundant evidence, both in the public archives and in the printed correspondence and other writings of Washington and Jefferson, that it was the practice in their time for the President not only to call for written opinions of the Attorney General, as at present, and to advise orally or by informal correspondence with him and the three Secretaries, but also to require of all these officers written opinions upon critical subjects of executive deliberation, as expressly provided by the Constitution.

Conspicuous illustration and evidence of these facts may be deduced from the extracts given in the text and the notes to Washington's writings. (See *e. g.*, vol. x, p. 321, note; vol. x, p. 546, note.) In one of these cases it will be perceived that the Cabinet, so called, consisting of the Secretary of State, Secre-

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tary of the Treasury, Secretary of War, and Attorney General, though not in any sense an organized body with legal attributes as such, yet proceeded to act in concert, adopting joint rules, signed by them, as to the political and military questions pending between the United States and France.

By an act of the next Congress, various modifications were made in minor details of the duty of the Secretaries of Treasury and War and of the Attorney General. (May 8, 1792.)

Meanwhile an organization had been effected of all those branches of the public service which are localized in the States, including, among other things, officers of the revenue, deputy postmasters, courts, and ministerial officers of the law, and the survey and sale of the public lands; but no material modification occurred in the great outlines of superior administration, until during the administration of John Adams, when the magnitude of our commerce, and the importance of our maritime relations, induced the Government to pay more attention to the military marine, and to establish the Department of the Navy, the chief officer of which to be called the Secretary of the Navy, whose duty it should be to execute such orders as he might receive from the President relative to the procurement of naval stores and materials, and the construction, armament, equipment, and employment of vessels of war, as well as to all other matters connected with the naval establishment of the United States. (April 30, 1798.)

Subsequently to this, and in the long period of the administrations of Jefferson, Madison, Monroe, and John Quincy Adams, no change in the general character of the executive departments took place, although all of them underwent more or less modification in details, by the intertransfer of old, or the creation of new branches of business, and especially the establishment of new bureaus, or the enlargement of old ones, materially affecting the internal organization of the Departments of State, War, Treasury, Navy, and Post-Office.

But, at the opening of Jackson's administration, the Postmaster General, whose duties and responsibilities had grown with the growth of the country to be of vast importance, was called, as the public interests required he should be, to the same duties

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of a cabinet counsellor of the President, which had been discharged theretofore by the four Secretaries and the Attorney General.

This fact constitutes the first important alteration in the arrangements of superior administrative duty and accountability which had occurred since 1798, when the Department of the Navy was established.

Perhaps an equally important fact, occurring at the same period, was the decision, by Jackson, in the circumstances attending the removal of Mr. Duane, as Secretary of the Treasury, and the appointment of Mr. Taney, of the question of the responsibility of the heads of departments to the President.

Finally, by an act passed at the close of Mr. Polk's administration, (March 3d, 1849,) in order to relieve the Departments of State, War, Treasury, and Navy, of branches of public business, created from time to time, which,—attached to those offices originally from considerations of fitness which had ceased to exist, or from the want of any more convenient destination to be given to them, now required to be placed in other hands,—a new executive department was organized, to be called the Department of the Interior, to the secretary of which was committed the supervision of the Patent Office, the General Land Office, the accounts of officers of the courts of the United States, Indian Affairs, the Pension Office, the Census, Mines, and the Public Buildings.

This act, it should be observed, does not provide in terms that the Secretary of the Interior shall be subject to the general direction of the President, as in the case of the Secretaries of State, War, Navy, and Postmaster General; nor do the acts appointing the Secretary of the Treasury and the Attorney General. On the other hand, none of the acts, except that establishing the Treasury Department, subject the chief executive officers to the duty of responding to direct calls for information on the part of the two Houses of Congress. This, however, has come, by analogy or by usage, to be considered a part of their official business. And the established sense of the subordination of all of them to the President, has, in like manner, come to exist, partly by construction of the constitu-

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tional duty of the President to take care that the laws be faithfully executed, and his consequent necessary relation to the heads of departments, and partly by deduction from the analogies of statutes.

One other fact, which has been alluded to already, requires more particular attention.

It is the constitutional duty of the President, and of course his right, to recommend legislative measures to Congress, which is in effect the suggestive initiation of laws. By express provision of law, it is made the duty of the Secretary of the Treasury to communicate information to either House of Congress when desired; and it is practically and by legal implication the same with the other secretaries, and with the Postmaster and the Attorney General. But the provision of law, which enacts that the Secretary of the Treasury shall make report and give information to either branch of Congress *in person*, when required, and which, if carried into operation, would in fact confer on the Secretary the advantage, though not a member of Congress, yet of explanatory discussion both in the Senate and the House of Representatives, does not appear to have been at any time practised upon by Congress, either in regard to the Secretary of the Treasury or any other head of department by analogy. But heads of departments have in some cases been called on to make explanations in person to committees of Congress.

It has appeared necessary to take this retrospective survey of the formation of the several executive departments, and of their general relation one to another, as preliminary to an explanation of the manner, in which existing laws provide for the superintendence and management of the judicial and legal business of the Government.

We have seen that the act establishing the office of Attorney General expressly imposed on him two classes of duty: first, to prosecute all suits in the Supreme Court in which the United States are concerned, and secondly, to give his advice and opinion in questions of law to the President and to the heads of departments.

In the discharge of the second class of the above-mentioned

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duties, the action of the Attorney General is quasi judicial. His opinions officially define the law, in a multitude of cases, where his decision is in practice final and conclusive,—not only as respects the action of public officers in administrative matters, who are thus relieved from the responsibility which would otherwise attach to their acts,—but also in questions of private right, inasmuch as parties, having concerns with the Government, possess in general no means of bringing a controverted matter before the courts of law, and can obtain a purely legal decision of the controversy, as distinguished from an administrative one, only by reference to the Attorney General.

Accordingly, the opinions of successive Attorneys General, possessed of greater or less amount of legal acumen, acquirement, and experience, have come to constitute a body of legal precedents and exposition, having authority the same in kind, if not the same in degree, with decisions of the courts of justice.

It frequently happens that questions of great importance, submitted to him for determination, are elaborately argued by counsel; and whether it be so or not, he feels, in the performance of this part of his duty, that he is not a counsel giving advice to the Government as his client, but a public officer, acting judicially, under all the solemn responsibilities of conscience and of legal obligation.

Although the act, requiring this duty of the Attorney General, does not expressly declare what effect shall be given to his opinion, yet the general practice of the Government has been to follow it;—partly for the reason already suggested, that an officer going against it would be subject to the imputation of disregarding the law as officially pronounced, and partly from the great advantage, and almost necessity, of acting according to uniform rules of law in the management of the public business: a result only attainable under the guidance of a single department of assumed special qualifications and official authority.

But the Attorney General is under no obligation to render an award, or determine a question of fact in cases referred to him; nor does an appeal to him lie from another department

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by any party assuming to be aggrieved by its action, and seeking to have it reviewed; nor is he to give advice to heads of departments on matters which do not concern their departments, and in which the United States have no interest; nor is he authorized to give official opinions in any case not falling within the scope of his duties, so as to connect the Government with individual controversies, in which it has no concern, and with which it ought not to interfere; nor is he in general to give official opinions to subordinate officers of the Government; nor ought he to advise individuals in regard to any question of legal right depending between them and the Government.

Some uncertainty has existed upon the point whether it is the duty or the right of the Attorney General to give *mere legal* opinions to the Senate or the House of Representatives, it having been denied in one case by Mr. Wirt. But he, in common with other persons holding the office, has recognised, by his action in sundry cases, the right of either House of Congress to call on him for information in any matters within the scope of his office, and his duty to communicate the same.

The other duty prescribed by the act of 1789, that of conducting the suits of the United States in the Supreme Court, is, of course, the function of an advocate, subject to the conditions only of the conscientious and honorable discharge of such a function, and with official relation both to the Government and the Supreme Court.

The act speaks of the Supreme Court alone, and it is the regular statute duty of the Attorney General only to conduct in person the causes of the United States there; but the President may undoubtedly, in the performance of his constitutional duty, instruct the Attorney General to give his direct personal attention to legal concerns of the United States elsewhere, when the interests of the Government seem to the President to require this. An example of this, having the force of contemporaneous exposition, occurs in the case of the instructions of Washington to the Attorney General, in 1792, to attend the circuit court at York, on occasion of certain indictments pending there, "to see that that business be conducted in a manner to which no exception can be taken with propriety, and for the

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purpose of giving to the measures of Government a more solemn and serious aspect." This precedent has been followed in other and later cases, which seemed to call for the special direction of the Government.

At successive periods in the history of the Government, the Attorney General has been invested with various other powers and duties, some of them special and temporary, and some permanent, some of them purely legal, and some administrative rather than legal, but all of them having apparent relation to the general nature of his office, and which it may be well to briefly indicate.

By an act passed at the second session of the first constitutional Congress, (April 10, 1790,) the foundations were laid for the system of granting letters patent of exclusive privileges for useful inventions or discoveries, this branch of public business being placed in the joint charge of the Secretaries of State and War and the Attorney General. Subsequently, (February 21, 1793,) it was committed to the charge, first, of the Secretary of State,—then of a bureau created for it, under the immediate authority of a special commissioner, and subject to the supervision of the Secretary of State,—until, as before stated, it was transferred to the new Department of the Interior.

By the act establishing the Mint of the United States, it was required that the Chief Justice of the United States, the Secretary and Comptroller of the Treasury, the Secretary of State, and the Attorney General, should constitute a board to inspect the assay of gold and silver for coinage; (April 2, 1792;) but this duty has been transferred since to the district judge and district attorney of Eastern Pennsylvania.

That was a duty administrative in its nature; as was that under the provision of law which appointed the Attorney General, together with the Secretary of State and the Postmaster General, a board to prepare forms and schedules for the agricultural, commercial, and other statistical facts to be collected in the taking of the seventh census of the United States, (March 3, 1849.)

In a very early case of commissioners appointed under treaty to adjudicate claims provided for thereby, it was made the duty

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of the President to appoint a person to act before such commissioners, in behalf of the United States, under the direction of the Attorney General, who was required to counsel such agent, and to attend in person whenever any questions of law or fact to be determined by the commissioners might render his presence necessary; and he was authorized to employ such agents, in the different parts of the United States, as the business before the commissioners should, in his opinion, require, and to be paid for their services at such rate as the President of the United States might order. (June 30, 1797.)

If the same proceeding, or something analogous to it, had been adopted in regard to some later cases of the same character, so as to insure a contentious investigation of all claims presented, it would have tended greatly to guard the responsibility and facilitate the safe action of the commissioners, and to produce results more satisfactory to the interests of the Government.

The Attorney General has himself been called on to act as commissioner to adjudicate claims under treaty, as in the case of the convention of indemnities between the United States and the Republic of Peru. (August 8, 1841.)

But the most serious of his incidental duties has been that of supervising the litigation of land claims arising under cessions of territory made to the United States by France, Spain, or the Mexican Republic.

By a series of acts for the adjudication of land claims under the treaties ceding Louisiana and Florida to the United States, it was made the duty of the Attorney General to decide on appeals from the district courts in which the claims were in the first instance litigated; to instruct the district attorney in regard to them, and to appear and prosecute those appeals in the Supreme Court. (May 26, 1824.)

By the various provisions of law for the adjudication of land claims in California, it is in like manner made his duty to receive and examine the transcripts of cases decided by the commissioners, before whom they are in the first instance to be heard, and determine which of the cases shall be appealed to the district courts and to the Supreme Court of the United

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States, (March 3, 1851, and August 31, 1852.) This branch of business, though in some sort temporary in its character, yet involves responsible present relations to, and ultimate management of, a large number of suits of the highest importance and interest, and therefore constitutes one of the most onerous of the present occupations of the Attorney General.

Another class of duties of a permanent nature, and of constant recurrence, is the examination, which he is required to make, of all titles of lands or sites purchased by the United States for the purpose of erecting thereon armories, arsenals, forts, fortifications, navy yards, custom houses, lighthouses, or other public buildings of any kind whatever; and without his certificate of the validity of the title, no public money can be expended upon any such land or site. (September 11, 1841.)

In all cases of suspended entries of public lands, the approbation of the Secretary of the Interior and of the Attorney General is necessary to the valid adjudication of the same by the commissioner. (August 3, 1846, and March 3, 1853.)

Finally, in regard to the great variety of duties appointed for the Solicitor of the Treasury, including the collection of debts due to the Government, the disposition of property taken by execution in its behalf, the management of suits in the local courts of the United States, and the instruction of district attorneys and marshals in the premises, (concerning which business more will be said hereafter,) it is made the duty of the Attorney General, at the request of the Solicitor, "to advise with and direct" him in such matters. (May 29, 1830.)

It remains only to say, in speaking of the legislation of Congress in regard to the office of Attorney General, that his department, in common with the others, has an official seal, and all copies of records authenticated by certificate under this are declared to be evidence equally with the original record or paper; that he, in common with other officers of the same class, appoints the clerks or other persons allowed by law for the service of his office, in virtue of the clause of the Constitution authorizing certain appointments to be vested in the heads of departments: and he exercises all such general powers as are by law vested in them, such, for instance, as the employment

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of counsel or other legal assistance in behalf of the United States.

Such are the general duties, ordinary and extraordinary, of the office of Attorney General, as expressly set forth by statute, and in addition to implied contingent duties, which, as already intimated, he may be called upon by the President or the Houses of Congress to perform.

On this point, which has been touched already, it may not be amiss to state more fully the constitutional and legal nature of the relation of the President to the heads of departments in matters of detail not explicitly provided for by acts of Congress.

We have cursorily seen that the act establishing the Department of State provides that the Secretary shall "perform and execute such duties as shall, from time to time, be enjoined on, or intrusted to him by the President, agreeably to the Constitution, relative to correspondence, commissions, or instructions to or with public ministers or consuls from the United States, or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such other matters respecting foreign affairs as the President of the United States shall assign to said department;" but the act does not say that the President may assign to him, or that he shall perform any duties not relating to the *foreign* affairs of the government. It proceeds further to provide that he shall "*conduct the business of the said department in such manner* as the President of the United States shall from time to time order or instruct;" which provision decides nothing as to what shall be the business of the department.

The act establishing the Department of War in like manner provides, that the Secretary shall "perform and execute such duties as shall from time to time be enjoined upon him by the President of the United States, agreeably to the Constitution, relative to military commissions, or to the land or naval forces, ships, or warlike stores of the United States, or to such other matters respecting military and naval affairs, as the President of the United States shall assign to said department, or relative

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to the granting of lands to persons entitled thereto for military services rendered to the United States, or relative to Indian affairs; and furthermore, that the said principal officer shall conduct the business of said department in such manner as the President of the United States shall, from time to time, order or instruct." Here also the statute power of the President to assign business to the Department, and to direct in it, is limited to a class of enumerated matters and the *manner* of conducting the business assigned.

In the act of 1789, "for the temporary establishment of the Post Office," it is provided "that the Postmaster General shall be subject to the direction of the President of the United States, in performing the duties of his office;" but that act at length expired by its own limitation, and the subsequent acts giving a more stable form to the Post Office, do not appear to contain any provision as to the directory power of the President. (See acts of February 20th, 1792, and March 3d, 1825.)

The act establishing the Department of Treasury, requires the Secretary "to perform all such services relative to the finance as he shall be directed to perform," but makes no reference, *eo nomine*, to the President.

The act establishing the office of Attorney General is wholly silent on this point.

The act establishing the Department of the Navy is precise in terms, to the effect that the Secretary shall "execute such orders as he shall receive from the President of the United States, relative to the procurement of naval stores and materials, and the construction, armament, equipment, and employment of vessels of war, as well as all other matters connected with the naval establishment of the United States." Nothing is said here of any general directory power on the part of the President.

Finally, the act establishing the Department of the Interior is silent on this point.

Now, upon this full exhibition of the statute provisions on the matter, questions arise both as to the substance of the business of the Departments, and the manner of conducting it, in regard to the directory power of the President.

It is impossible for Congress to foresee, and circumstantially provide for, all the possible future contingencies of executive business, either in respect of the business itself or the manner of conducting it. A necessary discretion must exist in the nature of things somewhere as to all such matters. And that ultimate discretion, when the law does not speak, must reside, as to all executive matters, with the President, who has the power to appoint and remove, and whose duty it is to take care that the laws be faithfully executed. Where the laws define what is to be done by a given head of department, and how he is to do it, there the President's discretion stops; but if the law require an executive act to be performed, without saying how or by whom, it must be for him to supply the direction, in virtue of his powers under the Constitution, he remaining subject always to that, to the analogies of statute, and to the general rules of law and of right. And this view of the question has been followed, uniformly, in the practical administration of the Government.

We shall appreciate the value of this conclusion in the sequel, when we come to perceive that great branches of public business are to be found, which are not assigned by statute to any particular department, or as to which there is no provision of statute deciding all questions of the manner of transacting such business.

The Supreme Court have recognised the existence of such a discretion, as being reposed for numerous contingencies, not only in the President in regard to the business of the departments, but in the heads of the departments themselves, by implication of law or as the executive agents of the President. The court say, that to attempt to regulate by law the minute movements of every part of the complicated machinery of administration, would evince complete disregard of the limits of the possible and the impossible. While the great lines of its movements may be marked out, and limitations be thus imposed on the exercise of its powers, there are numberless things to be done which cannot be anticipated or defined, but are, nevertheless, indispensable to the action of the Government. These things must of necessity be left to a wise and judicious discre-

tion. (*United States v. McDaniel*, vii Peters, 1; *United States v. Bailey*, ix Peters, 238.)

Question has existed as to the relation of the President and the respective heads of departments to the chiefs of bureaus, and especially the accounting officers of the Treasury.

It is not the duty of the President, and in general it is not convenient for him, to entertain appeals from the departments on the various matters of business, and especially the private claims, on which they have occasion from time to time to pass. Though he is to take care that the laws be faithfully executed, still it is physically impossible that he should do everything in person. Therefore, the Constitution and the laws give to him agents, through whose instrumentality the executive business may be transacted. Among these are the Heads of Departments, and other subordinate officers of the Government.

Now, from the fact that the executive agents, primary and secondary, are assigned by law to particular duties, it has been somewhat hastily inferred, that while it is indubitably true that he may direct the heads of departments, yet he has no authority over the chiefs of bureaus, and especially those in the department of Treasury. It needed only to carry this course of thought one step further, to say that the heads of departments themselves had no authority over those officers. This step was taken, and the doctrine it involves was, for a time, asserted. If maintained, it would have been the singular condition of a great government, in which the executive power was vested by Constitution in the President, and he had authority over the primary executive officers, but neither he nor they had any authority over the secondary executive officers, and, of course, it would be in the power of the latter to arrest, at any time, all the action of the Government.

Such a doctrine was against common sense, which assumes that the superior shall overrule the subordinate, not the latter the former. It was contrary to the settled constitutional theory. That theory, as we shall hereafter see, while it supposes, in all matters not purely ministerial, that executive discretion exists, and that judgment is continually to be exercised, yet requires unity of executive action, and, of course, unity of executive

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decision; which, by the inexorable necessity of the nature of things, cannot be obtained by means of a plurality of persons wholly independent of one another, without corporate conjunction, and released from subjection to one determining will; and the doctrine is contradicted by a series of expositions of the rule of administrative law by successive Attorneys General.

Thus, in a controverted matter of military allowance, requiring an act of decisive judgment, Mr. Berrien adjudged that the Third Auditor and the Second Comptroller are bound to take the decision of the Secretary of War, who may give it either by previous direction or by subsequent review. (Opinion, December 4, 1829.)

Mr. Taney gave similar advice on a question arising in the same department. (Opinion, September 10, 1831.)

Mr. Butler, Mr. Johnson, and Mr. Crittenden have affirmed the same doctrine. And on a question raised by the refusal of the Commissioner of Customs to take the direction of the Secretary of the Treasury, Mr. Crittenden elaborately reviewed the whole subject, and determined, by unanswerable argument, the right of the Secretary of the Treasury in the given case, and by analogy that of other heads of departments in correspondent cases. (Opinion, November 13, 1852.)

Meanwhile, if an opinion delivered many years ago by Mr. Wirt is now to be received as law, then, although an auditor, as even he admits, is subject to the direction of the Secretary of War, or the Secretary of the Interior, or some other Secretary, as the case may be, yet such auditor is wholly above the authority of the President, who, nevertheless, directs the Secretary. Had the idea presented itself as a mere question of the *order* of business, to the effect that the President should act upon the subordinate officers through the heads of departments, it might have answered as a matter of convenience, but not one of legal necessity. But the idea utterly excludes the authority of the President, and so, while recognising the authority of the head of department, in effect makes the latter also superior to the President: which is in conflict with universally admitted principles. Such an assumed anomaly of relation, therefore, as this idea supposes, resting upon mere opinion or exposition,

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must, of course, yield to better reflection, whenever it comes to be a practical question demanding the reconsideration of any Attorney General.

Upon the whole, then, heads of departments have a threefold relation, namely: 1. To the President, whose political or confidential ministers they are, to execute his will, or rather to act in his name and by his constitutional authority, in cases in which the President possesses a constitutional or legal discretion. 2. To the law; for where the law has directed them to perform certain acts, and where the rights of individuals are dependent on those acts, then, in such cases, a head of department is an officer of the law, and amenable to the laws for his conduct. (*Marbury v. Madison*, 1 Cranch, 49-61.) And 3. To Congress, in the conditions contemplated by the Constitution.

This latter relation, that of the departments to Congress, is one of the great elements of responsibility and legality in their action. They are created by law; most of their duties are prescribed by law; Congress may at all times call on them for information or explanation in matters of official duty; and it may, if it see fit, interpose by legislation concerning them, when required by the interests of the Government.

Some further explanation may be necessary, in regard to the relation of the departments to law as represented by the courts of justice. I do not speak now of the responsibilities of a head of department in the relation of crime, whether in questions of indictment or of impeachment. That is a matter of course. I speak of the power of the courts to act on the administrative business of the Government.

The Constitution in terms vests the legislative power in Congress, the executive power in the President, and the judicial power in the Supreme Court and in such inferior courts as the Congress may, from time to time, ordain and establish. It is perfectly clear that in general, and except at certain points where they necessarily touch one another, such as the participation of the Senate in treaties and appointments, and of the President in acts of legislation, it was intended that the three great departments shall move apart, each in its orbit. (Martin

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v. Hunter, i Wheaton, 304, 329.) This would not be the case if the courts of law had the power to review and overrule the acts of the Executive. Therefore, on the first great occasion in which the relation of the courts of the United States to the Executive came up for solemn adjudication, that of *Marbury v. Madison*, which was an attempt of a person to compel the Secretary of State to deliver to him a commission, the Supreme Court, while asserting the responsibility of a head of department to the law, in the general terms hereinbefore cited, and while discussing at length the legality of the act of the Secretary of State in refusing to deliver the commission, and thus voluntarily deciding *arguendo* questions of which they had confessedly no jurisdiction, were compelled, in conclusion, to say this, and to admit that the Constitution had not constituted them to be an appellate tribunal to review and revise the administrative acts of the President of the United States. The Supreme Court thereupon refused a mandamus, the process prayed for in this case, as they did subsequently in the case of *McIntire v. Wood*, which was an application for that process to compel the register of a land office to issue a certificate of purchase, (vii Cranch, 504;) and in the case of *Decatur v. Paulding*, where a party sought, by the same means, to compel the Secretary of the Navy to pay a pension to the petitioner, (xiv Peters, 497; see also *McClung v. Silliman*, vi Wheaton, 349.) But the Supreme Court meanwhile had claimed for the courts jurisdiction in the case of *Stokes v. Kendall*, where parties applied to the court to compel the Postmaster General to make what he conceived to be an illegal payment, and had granted the order on the ground that this was a ministerial act, while the other cases were of executive acts. (*Kendall v. United States*, xii Peters, 524.) It is not easy for a head of department to extract from these cases any very satisfactory rule of conduct, so as to know which, of many acts which he may be called on to perform, is ministerial, and not executive. And the court became, apparently, conscious of this, when the later case of *Decatur v. Paulding* came before them. There they refused to take an appeal from the Secretary of the Navy on a question of alleged legal right to a money payment, after having sus-

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tained an appeal from the Postmaster General on the same precise question, that of alleged legal right to a money payment, and proceeded to restate the limitations of the authority of the courts to act by mandamus on the Departments, confining the claim of jurisdiction more precisely to cases in which an act of Congress, lawfully passed, and within the proper powers of Congress, commands a specific act to be done, as, for instance, in the case of *Stokes v. Kendall*, a definite sum of money to be paid to a party named.

As the law now stands expounded by the Supreme Court, therefore, it is conceded that a head of an executive department of the Government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must do this in construing the acts of Congress, under which he is from time to time required to act. If he doubts, he has a right to call on the Attorney General for counsel. In general, his duties are not merely ministerial. The Supreme Court will not entertain an appeal from his decision, nor revise his judgment, in any case where the law authorized him to exercise discretion or judgment. Nor can it by mandamus act directly upon the officer, and guide his judgment or discretion in the matter committed to his care in the ordinary discharge of his official duties. Any such interference would involve a confusion of constitutional powers, and produce nothing but mischief in the business of the Government.

The organization of the executive departments of administration implies order, correspondence, and combination of parts, classification of duties, in a word, system: otherwise there is waste and loss of power, or conflict of power, either of which is contrary to the public service, in the regard of so much work to be done by such and such persons, and at a given cost of either time or money. Besides which, in a political relation, want of due arrangement of public functionaries and their functions, is want of due responsibility to society and to the law.

Accordingly, it has been the general purpose of Congress, at all times, both as to the great subdivision of departments, and

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the arrangement of the duties of each, to classify and to systematize.

This was an exigency of wise public policy, even when the business of the Government was little, and the number of its officers comparatively small; and it was, even then, accomplished approximately. But now,—when the territorial limits of the Union have spread from the Atlantic to the Pacific Ocean,—when the vast interests of the people of the Union are co-extensive with the habitable globe,—when the progress of wealth, intelligence, and mechanical invention has wonderfully enlarged and complicated the interests of society,—when our commerce extends to every land, and our ships are abroad on every sea,—when the American Union has become a primary power in Christendom,—and when the number of persons requisite to work this mighty machine of government has been proportionally augmented,—in such a state of things, that exigency of order, which was political wisdom always, has now come to be material necessity.

At such a period of the history of the Government, it seems fitting to consider where, if at all, in the conduct of its business, its mechanism can be saved from waste or collision, and its agents subjected to more complete and exact responsibility. And on these premises it is that the present suggestions are made as to the conduct of the law business of the Government.

According to the obvious theory of the constitution of the office of Attorney General, he has the superior charge of that business. And this theory is carried into practice in the main outlines of the duty of his office, as the following analysis will show.

1. Upon the great questions of law arising in the administration of public affairs, he gives opinion officially, both to the President and to the heads of departments.

2. As one of the confidential political counsellors of the President, it may be supposed that he advises more particularly in regard to the legal incidents of the appointments or other acts of the Government.

3. He conducts directly all suits in the Supreme Court in which the United States are concerned.

4. He advises or directs the Solicitor as to suits in which the

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United States are concerned, pending in the inferior courts of the United States.

5. He directs and prosecutes appeals in the great questions of land-title, which involve the proprietorship of all the soil in the successive increments of territory acquired by the United States.

6. He performs occasional duty, from time to time, in the protection of the interests of the United States in matters of adjudication under treaties with foreign powers.

7. He passes upon the title of all interest in lands acquired by the United States, by purchase for any of the local uses of government.

8. He communicates to Congress such information as they require, appertaining to the duties and business of his department.

In all these particulars he is, either directly or indirectly, and by statute, either express or implied, the administrative head, under the President, of the legal business of the Government. So far the administrative power, and the correspondent administrative responsibility exist, and they require modification in details only in order to be completely adapted to the theory of departmental organization.

Among these modifications, it is respectfully submitted, should be provision, either by law or regulation, for a periodical report by the Attorney General to the President, and through him to Congress, of the business of his office, including the official opinions given by him, and any pertinent suggestions regarding the interests of the Government.

Then come three important branches of public business, which the President is required, either by the Constitution or laws, to discharge in person or through lawful agents, as to which there is no specific provision by Congress, namely :

1. Suits in which the United States are ultimately concerned, but in which they are not a party of record, or which are not brought in the courts of the United States.

Thus it is that suits, on a foreign alleged grant, against a tenant in possession under patent from the United States, who will be called on to indemnify the tenant if he be evicted, are

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brought from time to time in the States; but no provision exists for protecting the eventual interests of the United States in such cases by notice to the Government; there may be collusion in the suit in the court below, or mismanagement; and even if the case come up to the Supreme Court, it may become known to the Attorney General by accident only, if at all.

Or, suit may be brought by some individual against an officer of the United States for some official act performed by him, and judgment rendered against him for heavy damages, perhaps without due defence, but for which Congress will be required to make indemnity.

Or a suit is brought by some person, or by a State, against an officer of the United States in the alleged possession of a citadel as its commander, or of a custom-house as collector of the revenue, for the purpose of thus obtaining a judgment of ejectment, which, in fact, evicts the United States.

Or conflicts of jurisdiction may arise in the States, involving the whole question of the execution of the laws of the United States, or the domestic or foreign peace of the Union, without the United States being in any sense a party, but in which the political interests of the Government as such are above all possible estimation.

These are cases of daily occurrence, and subsisting examples of which, in various forms, do now occupy the attention of the Executive; but the legal controversies thus arising have to be conducted by this or that head of department in whose branch of service they may happen respectively to arise, without any adequate and proper provision for their conduct.

The President undoubtedly has power to assign all these cases, as they arise, to the charge of the Attorney General; and it would be fitting that he should do so, provided the correspondent changes in the organization of this office be authorized by Congress.

2. Pardons. Applications are, of course, continually made to the President for the exercise of his constitutional power to grant reprieves and pardons for offences against the United States. Being constitutional, it is a power which Congress cannot take away or impair. It might, however, as it has done

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in other cases where needed, provide legal means and legal agents to aid the President in its exercise; in the absence of which he must of necessity exercise a lawful discretion in those respects. The conscientious determination of questions of this class requires, generally, the investigation of proceedings in court, and that of questions of law as well as of evidence, and the conduct of correspondence, in all which the President requires the instrumentality of a public officer. Formerly, this duty was performed by the Secretary of State; of late, it has been assigned to the Attorney General, in whose department, by reason of the nature of the business, it appropriately falls.

8. Commissions of public officers of a judicial character or relation.

No provision of law exists prescribing the department which shall receive the applications and recommendations, conduct the correspondence, and analyze or abstract the documents, in this branch of the public service. Formerly it was done by the Secretary of State; but it has no natural connection with the general duties of his office, and it has been assigned to the Attorney General as a more appropriate agent.

There is need of legislation in this respect to give method and convenience to the public business. When the commencement of organization took place in 1789, it was provided that all civil commissions should issue from the Department of State, and all military (including naval) ones from the Department of War. Thirty years afterwards, it was provided that all commissions of officers, employed in levying and collecting the public revenue, shall be made out and recorded at the Treasury Department, and sealed with its seal. As the duties of administration continued to increase, it was found convenient to give an official seal to the other departments, and to make it evidence in law; but no correspondent provision of law was enacted relative to the issue of civil commissions, which remained on the footing of the acts as to the Departments of State and Treasury. A systematic arrangement of things would require, that, as in the Departments of State, Treasury, War, and Navy, so in those of the Postmaster General, Interior, and Attorney

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General, commissions should be sealed, issued, and recorded in the office to which they belong.

One remaining branch of public service is to be considered, in order to dispose of this part of the subject, namely, supervision of the accounts of judicial and legal officers of the Government.

When the Home Department was established, the supervisory power previously exercised by the Secretary of the Treasury over the accounts of marshals, clerks, and other officers of the courts of the United States was transferred to the Secretary of the Interior. In this no special fitness appears. The Secretary of the Interior does not superintend the appointment of those officers; he has no power by statute to correspond with or direct them; and in several successive reports to Congress from that department, it has been recommended that the accounts of judicial officers, in common with their appointment, be transferred to the Attorney General.

Finally, if any of these proposed changes be adopted, or whether they be so or not, it is desirable that there should be some provision for the case of temporary vacancy in the office of Attorney General. By two acts, one of 1792, and another of 1795, provision is made that, in case of the absence from the seat of government or sickness of the Secretary of State, the Secretary of the Treasury, or the Secretary of War, or the death of either, or the temporary vacancy of either office, for not exceeding six months, it shall be lawful for the President to authorize any person, at his discretion, to perform the duties of such office until a successor be appointed, or until such absence or inability by sickness shall cease. (May 8th, 1792, and February 13th, 1795.) There is also an enactment by which, in case of the death, resignation, or absence of the Postmaster General, all his powers and duties shall devolve, for the time being, on the First Assistant Postmaster General, (July 2d, 1836.) No general provision exists for a temporary appointment by the President, either in regard to this, or to the Departments of the Navy, Interior, and Attorney General. The existing legislation leads to opposite and contradictory conclusions. It may be said, on the one hand, that the power expressly conferred on the

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President in three of the Departments, may be applied by analogy to the others. On the other hand, it may be said that the express enactment conferring the power on the President in those three cases, and making special peculiar legal provision in regard to a fourth, is the implied exclusion of any power of the President as to the remaining three. Perhaps the truer view of the question is to consider the two statutes as declaratory only, and to assume that the power to make such temporary appointment is a constitutional one. It has been exercised in regard to all the departments. In the most questionable of the cases, that of Attorney General, whose quasi judicial functions especially would seem to require to stand on legislative authority, proof exists in the files of the department that temporary appointment has been made by the President, as in the case of the departments whose heads are more exclusively executive officers. But a general provision is desirable to remove all doubt on the subject, as well respecting the Attorney General as the other non-enumerated departments.

I submit the propriety, therefore, of some further provision of law as to the arrangement of the legal affairs of the Government. The proposed changes do not enlarge the present power of the Executive in any respect. But they devolve additional labor on this office by transfer from others: on which account, I beg leave to add a few words of personal explanation.

When the office of Attorney General was created, and for long afterwards, inequality existed between his salary and that of other officers of the same class. The reason why he received less than the others is given by Washington in his letter to Mr. Edmund Randolph, tendering to him the first appointment of Attorney General, in which he says: "The salary of this office appears to have been fixed at what it is from a belief that the station would confer pre-eminence on its possessor, and procure for him a decided preference of professional employment." On this basis things continued until a very late period, the Attorney General receiving less salary than his associates, but being invited, as it were, by the nature of the office, into private professional practice in the courts, for which his near association with the Government, united to the professional qualifications

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which, from his being appointed to the office, he may be assumed to possess, would serve to give him great advantages. The published correspondence of the eminent statesmen of the first and second generations of our constitutional history, the reports of legal adjudications, the printed opinions of this office, and the documents on file in it, show that it was the received practice of the Attorney General not only to give opinions in private cases, and argue private causes at the seat of Government, but also to attend, as a practising barrister, at the sittings of courts in the States.

The office of Attorney General of the United States has been filled, in past times, by men, who, while eminent in their special profession, have been not less eminent in the career of parliamentary, diplomatic, administrative, or judicial distinction; and many of whom now live, enjoying, by just title, the respect and the confidence of their countrymen. At the bar of the Supreme Court they did honor to their station; and their official opinions are the law which guides the action of the Government. Nothing could be more foreign to my purpose than to reflect, in what follows, upon any of those distinguished persons for pursuing a course in office which was not forbidden, but, on the contrary, invited by law, and was justified by official usage, and by the approbation or acquiescence of Washington, Adams, Jefferson, and Madison.

Heretofore, the custom of the Attorney General in this respect did not essentially interfere with his proper official duties, nor prejudicially affect his general relation to the Government.

Within the last few years, however, the condition of the country has undergone changes, occasioning a vast augmentation in the amount of administrative business, which heads of department are called upon to perform; and it would not be possible now, as it has been heretofore, for the Attorney General, compatibly with performing well the duties of his office, to be frequently absent from the seat of Government, attending to private professional pursuits, nor could he find much leisure to prepare and argue private causes even before the Supreme Court.

It may deserve consideration, whether Congress, in establish-
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ing quite recently a common rate of salary for the Attorney General and the other heads of departments, did not have in mind the new state of facts above referred to, and for that cause intend to repeal, by implication, the previous implication of law, which prompted a continuance of the private professional pursuits of the Attorney General.

There is one other pertinent consideration. Most of the ordinary doctrines of law, and much of what is political organization, we have derived from the institutions of our mother country. The original theory of the office of Attorney General of the United States, which authorized and prompted him to engage in private professional practice, flowed, perhaps unconsciously, in part from the correspondent usage in Great Britain. But there the Attorney General is not a member of the cabinet, the Lord Chancellor performing the political duties which devolve upon the Attorney General here. And there is reason to doubt whether, at the present day, in the United States, it is expedient that a head of department should, under any circumstances, continue in the practice of law as a profession. Whatever change in the amount of public business the present greatness and wealth of the country may have produced, they have produced a still greater change in the multitude and the urgency of the private interests which assail the Government. No person, who has been conversant with public affairs here for the last twenty years, can fail, on comparing the state of things at the beginning and at the end of that period, to see how striking is the transition in this respect. Formerly, in an age of simpler manners, when the public expenditures were less, the number of places less, the population of the country less, the frequentation of the capital less, the ingenuity of self-interests less,—at such a time a Secretary, eminent in the legal profession, might, without possibility of reproach or suspicion of evil, take charge of private suits or interests at the seat of Government. He may do so now, perhaps; but that is not so clear as it formerly was; and it is not easy to perceive any distinction in this between what befits one or another head of department. Nay, arguments of objection could be suggested,

Employment of Counsel by a Department.

especially applicable in the existing state of society to the Attorney General.

However all these things may be, the actual incumbent of this office, in the magnitude and complication of the public interests with which it is now charged, experiences that its necessary duties are quite sufficient to task to the utmost all the faculties of one man; and he willingly regards those recent acts of Congress, which have at length placed the salary of his office on equal footing with other public offices of the same class, as intimation at least that the Government has the same precise claim on his services, in time and degree, as on those of the Secretary of State or the Secretary of the Treasury. As the corollary of that principle, he now proposes such modifications in the office as may render it really and effectually, as well as in theory, responsible for the law business of the Government.

The same thing in substance was earnestly proposed by Jackson in his first annual message to Congress, (December 8, 1829,) and has been twice recommended to Congress by later Presidents. Whatever reasons of public utility seemed then to require change in this respect, have, in the progress of time, acquired such additional force as to lead me to conviction of the propriety of presenting the subject to your notice, and with your approbation to the notice of Congress.

I have the honor to be, very respectfully, your obedient servant,

C. CUSHING.

The PRESIDENT.

EMPLOYMENT OF COUNSEL BY A DEPARTMENT.

Counsel, specially employed by the Secretary of State to aid the District Attorney in the prosecution of persons accused of being engaged in illegal military enterprises in Texas, should be paid out of the funds of the State Department.

ATTORNEY GENERAL'S OFFICE,

March 9, 1854.

SIR: I have examined the papers referred to me by your note of the 8th instant, consisting of the account of Hugh McQueen,

Witness Fees.

Esq., as counsel to aid the District Attorney of Texas in the management of the prosecution of certain persons in that State, charged with the violation of the acts of Congress forbidding military expeditions against the territories of a friendly foreign power, and the letter of the District Attorney in explanation.

It appears that a previous Secretary of State (Mr. Webster) deemed it proper that counsel should be specially employed in this matter, and it was done; Messrs. Arrington and Cummings having been so employed, while these cases were pending at Brownsville; and a similar exigency, it seems, called for the services of Mr. McQueen, when, by change of venue, the cases were transferred to Brownsville, and there tried.

But I have no authority in the matter to decide on the rights of Mr. McQueen in the premises, the present being one of the examples of the defective and anomalous condition of the law business of the Government.

Whatever counsel have been retained in execution of the instructions of Mr. Webster, must, according to the received construction of law in such cases, be considered at the charge of the State Department.

I am, very respectfully,

C. CUSHING.

Hon. WM. L. MARCY,
Secretary of State.

WITNESS FEES.

The President has no authority to allow extra witness fees, to a person who appeared as witness for the claimant in the reclamation of a fugitive from service, examined before a United States Commissioner in the State of Massachusetts.

ATTORNEY GENERAL'S OFFICE,
March 10, 1854.

SIR: The President referred to me some time since an application of Mr. Ellis in behalf of John Caphart, presenting the following case:

Mr. Caphart, being a police officer of Norfolk, in the State

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of Virginia, was a witness in the Circuit Court of Massachusetts, in the years 1851 and 1852, attending, on the summons of the District Attorney of the United States, to testify in the case of the United States *v.* Scott and others, indicted under the act of September 18th, 1850, respecting fugitives from service.

Mr. Caphart has received the regular witness fees, as taxed according to law ; and he now applies to the President to order the payment, to him, of an extra allowance in the premises from the Treasury of the United States.

It is admitted in the papers that this case does not come within the provision of the 11th section of the act of August 31st, 1852, which comprehends only ministerial officers of the United States, besides requiring taxation of the extra fees by the proper District or Circuit Court, which was expressly refused in this case by that court.

It is suggested, however, that the President may order the payment of extra witness fees to Mr. Caphart out of the appropriation for the expenses of the judicial establishment of the United States.

I do not perceive that the President has any power to order the allowance asked for ; and I merely remit the papers to you to be filed as appertaining to a branch of the business of your Department.

I am, very respectfully,

C. CUSHING.

Hon. R. McCLELLAND,
Secretary of the Interior.

APPOINTMENT OF ACTING PURSER.

The commander of a squadron of the Navy on a foreign station has power to appoint a provisional or acting purser in the absence of any purser of the Navy duly appointed by the President.

Although such appointment be subsequently disapproved by the Secretary of the Navy, still the acts which the acting purser may have performed while so acting are not thereby invalidated.

The United States is not responsible for, and cannot be charged with, money paid by a purser to his successor in office, which money did not belong to the Government.

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ATTORNEY GENERAL'S OFFICE,

March 12, 1854.

SIR: Your letter of the 12th of January presents certain questions of law, to understand which, and the conclusions to which my mind has come, on the subject, it is necessary to state the material facts as they appear by the documents transmitted.

On the 6th of December, 1848, a letter of instructions issued from the Secretary of the Navy (the Hon. J. Y. Mason) to Rodman M. Price, "Purser U. S. Navy," to the following effect:

"The cost of obtaining funds for the naval disbursements in the Pacific Ocean has for many years embarrassed the Department. The acquisition of an extensive front on that ocean * * * * renders it very important to the naval service that measures should be at once adopted to provide means for disbursement without any loss of exchange directly in the sale of bills, or indirectly by drawing on London. If it can be successfully established, as I doubt not it can be, that bills on the Department, at short dates, can be converted into coin at an advance beyond their value on their face, the result will be highly important: it will promote exchange on our Atlantic cities, and may supersede the necessity of the expensive agency at Lima. * * * You will proceed by the most speedy conveyance, across the Isthmus, to San Francisco, and establish yourself there, or at Monterey. * * * Your duty will be to procure funds for the squadron and other public naval purposes, on bills drawn on the Navy Department. You will, when required by the Commodore, or the Squadron Naval Officer present, effect such negotiations, taking care never to sell a bill below par, and realizing for the service any amount of premium which the market affords. If such negotiations are impracticable on the terms suggested, you are authorized to call on John Parrott, Esq., temporary Navy Agent at Mazatlan, and who has authority to draw on London. * * * *

"The steam propeller Massachusetts, expected to reach San Francisco in February next, will be placed in command of a

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naval officer. You will discharge the duties of purser while she is so engaged, and will be allowed a clerk on board. * *

"You will pay all officers of the Navy on special service in California, or who may be in that part of the United States detached from service.

"You will communicate with the Department on all and every suitable opportunity, and in all cases give due notice of bills drawn. * * * * The objects of the Department * * are to save the expense of transmitting specie to the Pacific, to dispense with bills on London by introducing those on Washington, to realize a premium to the extent of the local market, and to promote economy in the naval disbursements."

Under those instructions Purser Price proceeded to San Francisco and Monterey.

On the 4th August, 1849, the Secretary of the Navy, Hon. William Ballard Preston, issued to Commodore Thomas Ap Catesby Jones, commanding U. S. Squadron, San Francisco, California, this order: "The Department desires that the accompanying order, addressed to Purser Rodman M. Price, be handed to him at the earliest day practicable, and you will be pleased to offer all the facilities in your power for his speedy return to Washington."

"Navy Department, August 4, 1849. Purser Rodman M. Price, U. S. Navy, San Francisco, Cal. Sir: You are hereby detached from duty at the Naval Station of California, assigned to you under letter of instructions addressed to you by the Department on the 6th December last, and you will transfer all public money and public property remaining in your hands to your successor, or to such other disbursing officer of the Navy, as may be designated by the commanding naval officer of that station. Immediately after such transfer you will repair to the City of Washington for the purpose of settling your accounts."

The above orders were received at San Francisco by Commodore Jones on the 10th of October, 1849, by the mail steamer California. By letter of the same date addressed to Mr. Price, then at Monterey, by Commodore Jones, from flagship Savannah, Bay of San Francisco, the purser was informed of his

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recall to Washington, and it was added,—“You will perceive that it may devolve on me to appoint your relief, which I shall defer doing for the present, in the expectation that the forthcoming steamers, on their way from Panama, may bring a successor, or some specific instructions for my guidance.”

On the 9th of December, 1849, Purser Price having returned from Monterey to San Francisco, addressed this letter to Commodore Jones at San Francisco :

“Sir : Under my instructions from the Navy Department of 6th Dec., 1848, I have been paying all of the Navy Officers on special service in California and those detached from service. As I am detached from duty and no successor has arrived, I have to ask your order to designate to whom I shall transfer the pay rolls and accounts of this station, and also the Government property belonging to this office.”

On the 22d of December, 1849, Commodore Jones appointed, as acting purser of the sloop of war Warren, then at anchor in the port of San Francisco, Mr. A. M. Van Nostrand, who thereupon gave bond to the United States in the penalty of \$30,000, with two sureties, Augustus J. Bowie and Rodman M. Price, (each of whom justified to the sum of \$30,000 over and above liabilities,) conditioned that Van Nostrand should faithfully discharge his duties as acting purser in the Navy of the United States. This bond and security being approved by Commodore Jones, Van Nostrand took the oath of office as purser. Van Nostrand was the clerk of Purser Price, and had been long connected with the Navy at the New York station.

Thereafter,—Dec. 31st, 1849,—Commodore Jones addressed an order to Acting Purser Van Nostrand, directing him to call on Purser R. M. Price, and to receive from him, “all books, papers, office furniture, and funds on hand belonging to the Purser’s Department at San Francisco.”

This order being shown to Purser Price, he, on the same day, paid money to Van Nostrand, and took his receipt therefor in these words :

“San Francisco, Dec. 31st, 1849.

Received from Purser Rodman M. Price, forty-five thousand

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dollars, for which I hold myself accountable to the Government of the United States.

A. M. VAN NOSTRAND,
Acting Purser of the San Francisco Station."

Thereafter, Mr. R. M. Price paid another sum to Van Nostrand, and took, therefor, this receipt:

"San Francisco, January 14th, 1850.

Received from Rodman M. Price, Purser U. S. Navy, seventy-five thousand dollars, for which I hold myself responsible to the United States Treasury Department.

\$75,000. (Duplicate) A. M. VAN NOSTRAND,
Acting Purser."

The former sum, of \$45,000, included all the public money. The latter sum, of \$75,000, was the *private money* of R. M. Price,—as he states in his letter of December 16th, 1852, to the Fourth Auditor, A. O. Dayton,—which he saw proper to put into the hands of Van Nostrand. "I made," (says Mr. Price,) "a large transfer of money to my successor, which was an accommodation to the Government, and suited my private convenience as a remittance, believing that I would immediately receive the balance found due me on the adjustment of my accounts here."

That the latter sum of \$75,000 was not the public money, but an advance to Van Nostrand from the private funds of Mr. Price, is also shown by his accounts rendered to the Department, of his receipts and disbursements up to 31st December, 1849, whereby, including this receipt of 14th January, 1850, Mr. Price claims, upon his transactions at San Francisco, upwards of seventy thousand dollars as due to him from the United States.

Commodore Jones, immediately after the appointment of Van Nostrand, addressed a letter to the Secretary of the Navy, giving him the information.

On the 12th of March, 1850, Mr. Secretary Preston wrote to Commodore Jones, disapproving of the appointment of Van Nostrand, and directing that no money be placed in his hands; which letter Commodore Jones did not receive until June, 1850.

The Department of the Navy, in dispatching the letter of the 4th of August, 1849, to Commodore Jones, and to Purser Price,

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at San Francisco, did not foresee and provide specially for the exigency, which was occasioned by the discharge of Purser Price from his duties at the naval station at California. Subsequently an attempt was made by Secretary Preston to provide for such exigency, by sending out John N. Hambleton, who sailed in the United States ship *Vandalia*, on the 5th September, 1849, from Norfolk, around Cape Horn, but did not arrive at San Francisco until the 12th April, 1850,—more than three months after Commodore Jones had appointed Mr. Van Nostrand, and after Mr. Price had paid over the two sums in question to Mr. Van Nostrand. Commodore Jones had not been informed of the sending of Mr. Hambleton to succeed Purser Price. The letter from the Navy Department to Commodore Jones, to inform him of the embarkation of Mr. Hambleton on board of the *Vandalia* at Norfolk on 5th September, 1849, bears date 10th December, 1849, and was not received at San Francisco until long after the money had been paid over by Mr. Price to Mr. Van Nostrand.

Upon these facts, the following questions of law arise, as propounded by you, namely :

1st. Whether the appointment by Commodore Jones, of Mr. Van Nostrand as an acting purser, was valid under “the rules of 1817,” and the 6th section of the act of Congress “concerning the naval establishment,” approved March 30th, 1812?

2d. If the appointment was valid, whether the Department has authority to sanction the *advance* made by Mr. Price to Mr. Van Nostrand beyond the amount of *public money* which Mr. Price had on hand on the 31st December, 1849?’

The first question alludes to the act of 30th March, 1812, “concerning the naval establishment,” (2 Stat. at Large, by Little and B., p. 699, chap. 47, sect. 6,) which enacts, “that pursers in the Navy of the United States shall be appointed by the President of the United States, by and with the advice and consent of the Senate; and that from and after the first day of May next, no person shall act in the character of purser, who shall not have been thus first nominated and appointed, excepting pursers on distant service, who shall not remain in service after the first day of July next, unless nominated and appointed as aforesaid.

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And every purser, before entering upon the duties of his office, shall give bond with two or more sufficient sureties in the penalty of ten thousand dollars, conditioned faithfully to perform all the duties of a purser in the Navy of the United States."

By a supplement to this act, approved 1st March, 1817, (3 Stat. at Large, by Little & B., p. 350, chap. 24; vi Bioren, p. 177, chap. 197,) it is provided:

"Sect. 1. That every person now in service, or who may hereafter be appointed, shall, instead of the bond required by the act to which this is a supplement, enter into bond with two or more sufficient sureties in the penalty of twenty-five thousand dollars, conditioned for the faithful discharge of his duties as purser in the Navy of the United States, which said sureties shall be approved by the Judge or Attorney for the United States, for the district in which such purser shall reside.

"Sec. 2. That, from and after the first day of May next, no person shall act in the character of purser, who shall not enter into bond as aforesaid, excepting pursers on distant service, who shall not remain in service longer than two months after their return to the United States, unless they shall comply with the provisions of the first section of this act."

But the statute, prohibiting pursers to act unless first approved by the Senate, must have a construction consistent with the exception to the power of the Senate contained in the Constitution, whereby "The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session,"—so that the statute shall not be in conflict with the Constitution. That is to say, there is an exception, not expressed in the statute but necessarily implied.

The Constitution itself, in relation to the power of the President to fill up "vacancies which may happen during the recess of the Senate," must have a reasonable construction, adapted to the end, utility, and practical effect intended in conferring that power. If a vacancy happen during the session of the Senate, but does not come to the knowledge of the President until the recess of the Senate, yet the President may fill up the vacancy by a commission to expire at the end of their next session.

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(Mr. Taney's opinion, of July 19th, 1832.) Such construction is necessary and proper, considering the vast extent of territory subject to the Government of the United States, and especially when considered in reference to officers of the Navy on far distant service, in the different seas and oceans.

In such distant service, vacancies will happen which cannot abide to be filled until the President may be informed and exercise his appointing power. To meet such exigencies, the regulations of the Navy, contained in what is called commonly the Blue Book, have made provision. These regulations were prepared under the act of Congress of 7th February, 1815, (iii Stat. at Large, p. 202, chap. 35, sect. 2; were approved by the President, promulgated in 1817, and communicated to Congress by President Monroe's Message of 20th April, 1818. In those regulations, under the head of "Appointments," we have the following :

"On foreign stations a commander may, when absolutely necessary, give acting appointments to fill vacancies which may be occasioned by death or other circumstances; but in such cases he shall take the earliest opportunity to make known the circumstances to the Secretary of the Navy, and state his reasons for making such acting appointments." (Blue Book of Naval Regulations, "Of Appointments," sec. 2, p. 37; American State papers—Naval Affairs, p. 516.)

The regulation above quoted has not been abrogated, but has been, ever since its promulgation, considered as entitled to respect and obedience. Many acting appointments, including acting pursers, have been made under it, which have received the recognition of the President, the Navy Department, the accounting officers of the Treasury, and the courts of law. For the present, it will suffice to cite the case of Lieutenant Randolph, appointed acting purser after the death of Purser Timberlake, whose accounts as acting purser were adjusted by the accounting officers of the Treasury. The attempt at a readjustment of them produced the decision of Chief Justice Marshall and Mr. Justice Barbour in the Circuit Court of the United States for the District of Virginia, Nov. term, 1833, ii Brockenborough, 466 to 487; Ex parte Randolph.

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The filling up a vacancy by an appointment of one to act ad interim, and for a particular exigency, in a distant service, is in its nature an executive, ministerial, and administrative power. Independently of the act of 7th February, 1815, it was within the constitutional power of the President to make the regulation before quoted. He is limited in the exercise of his powers by the Constitution and the laws: but it does not follow that he must show a statutable provision for everything he does. The Government could not be administered upon such a contracted principle. The great outlines of the movements of the Executive may be marked out, and limitations imposed upon the exercise of his powers, yet there are numberless things which must be done, which cannot be anticipated and defined, and are essential to useful and healthy action of government.

In the acts of 1812, and 1817, before quoted, for regulating the appointment and qualifications of pursers, there are express exceptions as to pursers, appointed or to be appointed, on distant service.

It is to be observed, also, that, in 1849, there was neither District Judge nor District Attorney to approve the sureties of Acting Purser Van Nostrand.

The power of the President to make rules and regulations for the Navy and the Army, not contravening the Constitution and the laws, but purely executive and administrative, has been adjudged by the Supreme Court of the United States in the case of the *United States v. McDaniel*, vii Peters, 14; *United States v. Eliason*, xvi Peters, 301; *Gratiot v. United States*, xv Peters, 370, 371, 373, 375; *United States v. Freeman*, iii Howard, 567.

The validity of such regulations is alluded to and acknowledged in the third section of the act of 3d March, 1839, and the second section of the act of 23d August, 1842, v Statutes at Large, p. 349, chap. 82, and p. 570, chap. 183.

The Secretary of the Navy is the regular constitutional organ of the President of the United States for the administration of the naval affairs of the Government. The President is the commander-in-chief of the Navy and the Army. Commodore Jones

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was not at liberty to question or defy the regulations promulgated by the President of the United States, nor to disobey the orders issued to him from the Navy Department. Such acts on his part would have been breaches of proper discipline, (*United States v. Eliason*, xvi Peters, 302,) and might have subjected him to the penalty of "death or such other punishment as a court martial shall inflict;" as enacted by the 14th article of the rules and regulations adopted by Congress for the government of the Navy. Act of 23d April, 1800, ii Stat. at Large, p. 47, chap. 33.

I proceed now to consider the second question, namely, whether Mr. Price is entitled in law to be credited by the Government with the sum of money paid by him to Mr. Van Nostrand on the 14th of January, 1850, or in other words, whether the Government, and through the Government the sureties of Van Nostrand, are responsible to Mr. Price for this money.

It may be assumed as a general doctrine of administrative law that public officers, whether of deposit or disbursement, can make the Government and their sureties responsible only for *official acts*.

As a plain corollary from this doctrine, it may, in like manner, be assumed that, if any citizens of the United States deposit his own private money for safe keeping, or for transmission and remittance, in the hands of a public officer, such as a collector of customs, assistant treasurer of the United States, a paymaster in the Army, or a purser in the Navy, no liability in the premises can be thereby cast on the Government.

It is quite immaterial in such case, what writings may have passed between the depositor and the bailee, what engagements the latter may have entered into with the former. No officer of the Government can bind the Government except in things, and to the extent, which his official duties, under acts of Congress, and the lawful instructions of the proper executive superior, may authorize and require.

This doctrine, with all its incidents and consequences, is no peculiar privilege or claim of right on the part of the Government; but belongs to the ordinary question of the power of an agent to bind his principal.

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A master, by the general rules of law, is liable for the acts of his servant, if done by his command, either expressly given or implied, but not otherwise. (1 Blacks. Com. 429.)

Therefore, the Supreme Court of the United States say :

“It is by no means true * * that the acts of agents derive their validity from professing, on the face of them, to have been done in the exercise of their agency * *. The liability of the principal depends upon the facts, 1. That the act was done in the exercise; and, 2. Within the limits of the powers delegated.” (Mechanics’ Bank v. Bank of Columbia, v Wheaton, 326; See also Foster v. Essex Bank, xvii Mass. R. 479.)

This rule applies to all cases in which the official acts of an agent are to be distinguished from his private or personal acts, whether he be the agent of an ordinary principal, or an officer of the Government.

It seems undeniable that this money, in the present case, was the private funds of Mr. Price. He, himself, so declares: and the accounts as stated by the Second Auditor confirm his declaration.

The present inquiry, therefore, must be a special one,—Whether the money paid by Mr. Price to Van Nostrand on the 14th of January, 1850, was received by the latter officially, and according to law, for official purposes.

Now, the 20th of the regulations of the Navy contained in the Blue Book, so called, is in the following words:

“No purser shall draw money at any time or place without the approval and signature of his commanding officer.” (American State Papers, Naval Affairs, p. 527.)

This regulation is imperative, absolute, without qualification of circumstances. It comprehends the subject-matter; for it is of no moment, so far as regards the question of the power of a purser to draw money, whether it is taken from a banker, or other person,—on the spot, or at a distance,—whether by verbal draft or by written draft,—whether by payment received on the technical drawing of a bill of exchange, or, as in this case, by an implied draft on the Treasury of the United States. The regulation is a valuable and wise one, too; it being the only

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effective check on the power of a purser to receive money abroad in the name of the Government.

Nothing remains, therefore, but the inquiry whether this payment to Van Nostrand was made with the written approval of the commanding officer of himself and of Mr. Price.

The order of Commodore Jones, as before given, was that Van Nostrand should receive from Mr. Price "all books, papers, office furniture, and funds *belonging to the Purser's Department at San Francisco.*" This order was in conformity with that from the Navy Department to Mr. Price, which was to transfer to his successor all "public money and public property" remaining in his hands. And the application of Mr. Price to Commodore Jones thereon was for the designation of a person to whom he might transfer "the pay rolls and accounts" of the station, and the Government property belonging to the office. All these documents unequivocally exclude the idea of the approval and signature of Commodore Jones having been given to the payment of this money to Van Nostrand.

My opinion, therefore, upon the whole case is,

1. That the appointment of Van Nostrand as acting purser by Commodore Jones was lawful and valid under the circumstances; and that the subsequent disapproval of the appointment, by Mr. Secretary Preston, could not retroact to make void previous lawful acts of the acting purser, in his receipt from Mr. Price, of public money and other public property in obedience to the order of Commodore Jones.

2. That the Government is not responsible for, and cannot be charged with, the private funds paid by Mr. Price to Van Nostrand.

I am, very respectfully,

C. CUSHING.

Hon. JAMES C. DOBBIN,
Secretary of the Navy.

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COURTS MARTIAL.—LIEUTENANT DEVLIN.

After the sentence of a court martial dismissing an officer has been approved and acted on by the President, it cannot be revised except for suggestion of absolute nullity in the proceedings.

Objection to a naval court martial because consisting of only nine members must be taken during the trial, as only involving the question of fact whether a greater number of officers could have been detailed without injury to the service, and not being a ground of nullity.

ATTORNEY GENERAL'S OFFICE,

March 13, 1854.

SIR: Your letter of the 18th ult., transmitting to me the record of the proceedings of a general court martial in the case of Mr. Devlin, requested my opinion "upon the objections taken by Mr. Gillett (counsel for Mr. Devlin) to the validity of the proceedings of the court."

On examining the paper in question, it is found to consist of legal arguments upon sundry alleged errors in said proceedings, either of law or fact; and my opinion is, in effect, asked upon these allegations.

I presume your only object is to ascertain what executive action, if any, the considerations of law adduced require of the Navy Department or of the President, in the case of Mr. Devlin.

It appears that Mr. Devlin, being at the time a lieutenant in the marine corps, under the new appointment referred to in my opinion of September 20, 1853, was tried by a general court martial on certain charges, on which being found guilty by the court, he was, on the 15th of September, 1852, sentenced to be dismissed, which sentence was afterwards approved by the President and carried into execution.

Upon this record, Mr. Devlin now applies to you, praying, among other things, that the proceedings of the court martial "may be opened and set aside" for the errors alleged by the party and his counsel.

This, then, is the question: whether the proceedings of that court martial can lawfully, at this time, be reopened, reviewed, and set aside for any of the causes alleged.

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This question has been repeatedly considered by my predecessors, and decided by them.

Mr. Attorney General Legaré holds that a sentence, once confirmed by the competent authority, cannot be reopened. "It is a vain conceit," he says, "that, because the proceedings (of a court martial) are irregular, and fatally irregular, if the exception be taken in proper time, therefore, the judgment once suffered to be entered up is void." (Opinion, April 3d, 1843.)

In another case, where the proceedings of the court were confessedly irregular, and the sentence was not accounted a just one, Mr. Attorney General Nelson says:—"I know of no revisory power by which that sentence can now be rescinded, annulled, or modified. It has been passed upon by the competent authority, from whose decision the law has provided no appeal. It must, therefore, for ever stand as the judgment of the court. * * * No case has been brought to my notice in which an officer, once dismissed, has ever been restored to the service otherwise than by nomination by the Chief Magistrate and confirmation by the Senate; * * * and if such a case has occurred, I should not hesitate to declare it to be in direct repugnance to the Constitution and laws." (Opinion, November 6th, 1843.)

Mr. Devlin's counsel cites a case in which Mr. Attorney General Crittenden is supposed to have disregarded this doctrine; but Mr. Crittenden expressly confines his opinion to the case, "and its particular circumstances," and thus excludes all idea of introducing any new doctrine. (Opinion, September 19th, 1850.) And in a subsequent case, Mr. Crittenden emphatically refuses to reopen a sentence, and returns the papers to the Department from which they came, as being a reference "without cause or consequence." (Opinion, June 23d, 1851.)

It is impossible, it seems to me, to deny the soundness of these conclusions of my predecessors. I defer to them as precedents; and they have the approbation of my judgment.

The decision of the President of the United States, in cases of this sort, is that of the ultimate judge provided by the Constitution and laws. Like that of any other court in the last resort of law, it is final as to the subject-matter.

There is one, and but one, legal question, which would be

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competent in this case after the final decision of the President upon it; namely, that of nullity of the proceedings, as being, for instance, *coram non judice*, or, for other cause, absolutely void *ab initio*.

Among the exceptions, it is true, is the suggestion that the rules and regulations for the government of the Navy, art. 35, (ii Stat. at Large, p. 50,) provide that "No general court martial shall consist of more than thirteen, nor less than five, members, and as many officers shall be summoned in every such court as can be convened without injury to the service, so as not to exceed thirteen:"—whereas, in this case, the court was composed of only nine members. But this objection is matter, not of nullity in the face of record, but of possible error merely, depending on a question of fact, namely, what number of officers could have been summoned "without injury to the service." That question of fact required to be raised at the time, in order that the court or the President of the United States might judge and decide thereon, as they or he had the power to do. It does not appear, however, by the record or by the paper filed by Mr. Devlin as an appeal to the President, that this question was raised at that time. If it had been, the decision of the court, or certainly of the President in approving the sentence, would have been final and conclusive on the point.

All the other points raised by Mr. Devlin, or his counsel, have relation to the question of pardon or reappointment, and, of course, do not involve questions touching the legal validity of the proceedings, which seem to me not open to any present legal exception.

I, therefore, return the papers to you, herewith; and am very respectfully,

C. CUSHING.

Hon. JAMES C. DOBBIN,
Secretary of the Navy.

Case of Sailing Master John Rush.

CASE OF SAILING MASTER JOHN RUSH.

An officer of the Navy becoming disabled from service, but not in the line of his duty, was permitted to retain his commission as an officer not under orders for actual service, and received, as such, half-pay during twenty-seven years of total disability:—Held, that the sum thus allowed is the utmost which could be lawfully paid to the party, and that his administrator has no right to demand arrears of full pay in the case.

ATTORNEY GENERAL'S OFFICE,
March 14, 1854.

SIR: I have considered the case of the late Sailing Master John Rush, referred to me by your letter of the 7th of July last.

This case was referred to my immediate predecessor, Mr. Attorney General Crittenden, upon the application of the administrator of Mr. Rush as hereinafter stated, and upon the following facts:

Whilst in service, Sailing Master Rush became insane. In September, 1810, he was placed in the hospital in Philadelphia, wherein he continued insane and without a lucid interval until his death in 1837:

After he was so incapacitated for service, he was placed on half-pay, in the year 1810, by the Hon. Paul Hamilton, then Secretary of the Navy, not as a pensioner, but as an officer not on duty and on shore, and entitled only to half-pay, under the act of 21st April, 1806, (Stat. at Large, vol. ii, p. 390.)

The half-pay, until 31st July, 1813, was paid to his father, Dr. Benjamin Rush, during his lifetime. After his father's death, no payment of the half-pay was made, during the life of the said John Rush. He was incapable by his insanity; no committee had been appointed; and by the will of his father provision was made for his support, if the half-pay should prove insufficient.

In February, 1849, Dr. William Rush obtained letters of administration upon the goods and chattels, rights and credits of his deceased brother John, and thereupon presented to the accounting officers of the Treasury the claim for arrearages of

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half-pay for said decedent, from July, 1813, until his death in 1837.

The question as to this claim was referred by the Secretary of the Navy to the Attorney General. On the two questions referred, Attorney General Crittenden decided—1st. That the claim for half-pay was legal; 2d. That there was no appropriation wherewith to pay it.

Upon this the half-pay was allowed and stated, and an appropriation was asked and made by Congress by the act of 3d of March, 1851, (Stat. at Large, vol. ix, p. 625, ch. 34,) "For arrearages of pay which accrued to John Rush, late sailing master, from 31st July, 1813, to 9th August, 1837, \$6095.71."

Having received this sum, the administrator of the deceased John Rush presented a claim for interest. That claim was rejected.

In April, 1853, a claim was preferred to the Department on behalf of the administrator of the deceased for full pay, instead of half-pay which had been allowed and paid as aforementioned. That claim has been rejected by the Auditor and Comptroller. The Secretary of the Navy has referred this question to the Attorney General.

It is insisted for the administrator, that as Sailing Master John Rush was in service, never resigned, was never sentenced by a naval court martial to be dismissed the service, nor stricken from the register, except upon a premature report of his death, that therefore he was entitled to full pay.

By the act to provide a naval armament, approved March 27th, 1794, (Stat. at Large, vol. i, p. 350, ch. 12,) the President was authorized to provide four ships of forty-four guns, and two ships of thirty-six guns, each. Sec. 2 prescribes the number and grades of commissioned officers to be employed on each ship.

By sec. 3, "There shall be employed in each of said ships, the following warrant officers, who shall be appointed by the President of the United States, to wit: one sailing master, one purser," &c., &c.; and certain petty officers to be appointed by the captains of the ships, respectively.

By sec. 6, the pay and subsistence of the officers and petty

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officers was fixed: those of a sailing master at "forty dollars per month and two rations per day."

By the act for a naval peace establishment and for other purposes, approved March 3d, 1801, (Stat. at Large, vol. ii, p. 110, ch. 20,) it was enacted in sec. 1, That the President of the United States be authorized "whenever the situation of public affairs shall, in his opinion, render it expedient, to cause to be sold * * * * all or any of the ships and vessels belonging to the Navy, except the frigates United States, Constitution, President, Chesapeake, Philadelphia, Constellation, Congress, New York, Boston, Adams, Essex, John Adams, and General Green, (in all thirteen frigates,) and to lay up all the frigates thus to be retained, except such as are directed by this act to be kept in constant service in time of peace.

"Sec. 2. That six of the frigates to be retained, shall be kept in constant service in time of peace; * * * the residue of the frigates to be retained, shall be laid up in convenient ports, and there shall be permanently attached to each frigate so laid up, one sailing master, one boatswain, &c., &c.; * * the sailing master shall have the general care and superintendence of the ship. * * *

"Sec. 4. The President of the United States shall retain in the navy service, in time of peace, nine captains, thirty-six lieutenants, and one hundred and fifty midshipmen, including those employed on board of the six frigates to be kept in service, and that he be authorized to discharge all other officers in the navy service of the United States; but such of the aforesaid officers as shall be retained in service, shall be entitled to receive no more than half their monthly pay during the time they shall not be under orders for actual service."

Upon this statute, it is to be observed: that the distinction between those officers who are under orders for *actual service*, and those who are not discharged, but retained for ships and vessels laid up in ordinary, or for being ordered into *actual service* as occasion shall require, is clearly drawn; those under orders for actual service to receive full pay, those not under orders for actual service to receive only half-pay.

The next statute bearing upon the question under considera-

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tion is that entitled "An act in addition to an act entitled 'An act supplementary to the act providing for a naval peace establishment, and for other purposes,' approved 21st April, 1806, (ii Stat. at Large, p. 390, ch. 35.)

Sec. 1 repeals the second and fourth sections of the act of 3d March, 1801, just before quoted.

Sec. 2 authorizes the President "to keep in actual service, in time of peace, so many of the frigates and other public armed vessels of the United States, as in his judgment the nature of the service may require, and cause the residue thereof to be laid up in ordinary, in convenient ports."

Sec. 3. "That the public armed vessels of the United States in actual service, in time of peace, shall be officered and manned as the President of the United States shall direct:—provided that the officers shall not exceed the following numbers and grades, that is to say, thirteen captains, nine masters commandant, seventy-two lieutenants, and one hundred and fifty midshipmen; but the said officers shall receive no more than *half their monthly pay* during the time when they shall not be under orders for actual service; and provided further that the whole number of able seamen, ordinary seamen, and boys, shall not exceed nine hundred and twenty-five;—but the President may appoint for the vessels in actual service, so many surgeons, surgeon's mates, sailing masters, chaplains, pursers, boatswains, gunners, sailmakers, and carpenters, as may, in his opinion, be necessary and proper."

By this repeal of the second section of the act of 3d March, 1801, the President was left at liberty as to the number of frigates to be kept in actual service, or to be laid up in ordinary; he might keep more or less than six frigates in actual service, and might lay up in ordinary more or less than seven out of the whole number of thirteen. As to those laid up in ordinary, he was not bound to attach to each the number of warrant officers, and marines and seamen, prescribed by the act of 1801.

By the repeal of the fourth section of the act of 1801, the President was not bound to discharge in time of peace all the

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officers of the Navy except nine captains, thirty-six lieutenants, and one hundred and fifty midshipmen.

By the second section of this act of 1806, the President was authorized to keep in "actual service" in time of peace, as many of the thirteen frigates, and as many of the other public armed vessels as in his judgment the service in time of peace required.

The act of 27th March, 1794, prescribed the precise number and grades of commissioned officers, warrant officers, petty officers, marines, and seamen, by which each frigate, of this or that class, should be governed and manned. By the third section of this act of 1806, the public armed vessels, frigates, and others, which were "in actual service" in time of peace, "shall be officered and manned as the President of the United States shall direct:" but with the limitation and proviso that the officers in actual service shall not exceed the number and grades of thirteen captains, nine masters commandant, seventy-two lieutenants, one hundred and fifty midshipmen, for all the vessels in actual service; the whole number of able seamen, ordinary seamen and boys, not to exceed nine hundred and twenty-five; with, for the vessels in actual service, so many surgeons, surgeon's mates, sailing masters, chaplains, pursers, boatswains, gunners, sailmakers, and carpenters, as in the opinion of the President shall be necessary and proper.

By this third section of the act of 1806, providing for a naval peace establishment, the officers are to receive "no more than half their monthly pay during the time when they shall not be under orders for actual service."

The argument filed for the administrator of Sailing Master Rush, contends, that the words, "but the said officers shall receive no more than half their monthly pay during the time when they shall not be under orders for actual service," are to be confined exclusively to the "thirteen captains, nine masters commandant, seventy-two lieutenants, and one hundred and fifty midshipmen" previously mentioned.

That construction discards the meaning and sense of the statute, and violates the approved rules for the exposition of statutes.

Every statute ought to be expounded not according to the letter, but according to the meaning: *Qui hæret in litera, hæret in cortice*: "For words, which are no other than the reverberation of the air, do not constitute the statute, but are only the image of it. It is not the words of the law, but the internal sense of it, that makes the law. The letter of the law is the body of the law, and the sense and reason of the law is the soul of the law, *quia ratio legis est anima legis*." (Partridge v. Strange, Plowd. 82; *Eyston v. Studd*, Plowd. 465.)

"Such construction ought to be put upon a statute as may best answer the intention the makers of it had in view." "We ought to consider the whole discourse together, in order perfectly to conceive the sense of it, and to give to each expression, not so much the signification it may bear in itself, as that which it ought to have from the thread and spirit of the discourse." (Bac. Ab. Statute (I), pl. 38, p. 235; Dwaris on Statutes, p. 557; Vattel, Book 2, ch. 17, § 285, p. 235.)

The intent of the legislature is not to be collected from any particular part or expression taken by itself, but on all the parts of the statute together. (*Lincoln College's case*, 3 Co. 59 b; Co. Litt. 381 a; *xix Viner's Ab. Statutes* (E. 6) pl. 81, 89, 90, p. 519, 520; Dwaris on Statutes, 587.)

"Every thing which is within the interest of the makers of the act, although it be not within the letter, is as strongly within the act as that which is within the letter and intent also." (*Stowell v. Zouch*, Plowd. 366; *Beawfages' case*, x Co. 101; iv Bac. Ab. Statute, (I) pl. 42, p. 648; Dwaris on Statutes, 557.)

If the words of a statute, when taken in a strict grammatical sense, (as for instance, by referring them to the last antecedent,) would involve an absurdity or an inconvenience, or render the enactment nonsensical, in such case, the grammatical sense must be modified so far as to avoid the absurd, inconvenient, or nonsensical consequence; and to that end a word may be referred, not to the last antecedent, but to one more remote, to such as will give a sensible and reasonable construction, so as to adapt the relative "to the fitness of the matter or person," (*ad aptitudinem rei*) thereby to reach the intent and reason of the law.

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(Guier's case, i Dyer, 46, 47; *Reniger v. Fogossa*, Plowd. 13; *The King v. Lamb, v Durn. & East*, 76-78; *The King v. Younger, v Durn. & East*, 451, 452; *The King v. Neal*, viii Durn. & East, 244, 245; *Applegurth v. Colley*, x Meeson & Welsby, 730; *Stracey v. Nelson*, xii Meeson & Welsby, 541, 544; *Dwarris on Statutes*, 590, 591.)

The statutes of 1794 and of 1806, taken together as one amended statute and construed as one whole, plainly indicate the intention of Congress, that some of the armed vessels were to be laid up in ordinary, and some were to be kept in actual service;—that, whilst the number of vessels to be kept in actual service was confided to the discretion of the President of the United States, yet his discretion, as to the number and the classes of the vessels to be by him employed in actual service, was limited by the number of the commanding officers, the captains, masters commandant, lieutenants, and midshipmen, and by the number of able seamen, ordinary seamen, and boys, not to be exceeded in such actual service;—that, as the complement of officers for all the vessels of war, appointable by the President, had been appointed, by commission or warrant respectively, they were not to be discharged, but retained on the peace establishment;—that therefore, whilst some were under orders for actual service on board of such vessels as the President in his judgment deemed necessary for the service, others were supernumerary, waiting orders for actual service;—and that only those officers, who were under orders for actual service, were to be on full pay, whilst all the others were to be on half-pay.

As the number of vessels, and their classes, necessary for the service, might vary from time to time, and according to circumstances, so the number and the grades of the officers, necessary for the command and management of the vessels in actual service, would be uncertain and variable, and be selected from time to time as the service should require.

But the argument filed for the administrator of Sailing Master Rush erroneously assumes in effect and consequence, that the President of the United States would, in the first instance, and for all future occasions, select, and designate by name, thirteen captains, nine masters commandant, seventy-two lieu-

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tenants, and one hundred and fifty midshipmen to be called into actual service when needed, and that these "the said officers," and no others, were to receive no more than half their monthly pay during the time when they were not under orders for actual service, whilst all other officers not so designated for actual service, were to stay at home, receiving their full monthly pay. Therefore, that Sailing Master Rush, not being of the class of officers designated for actual service, nor being in actual service, but placed for insanity in the Lunatic Hospital of the State of Pennsylvania, was entitled to *full* pay.

That cannot be the meaning of the law. On the contrary, the President, when this or that vessel was designated for actual service, and to be put into commission, would then assign to such vessel, such number of officers, and of such grades, as, in his opinion, the nature of the service, and the class or tonnage of the armed vessel, required, and not before; and then such officers would be put under orders for actual service; and then, and not before, the officers ordered into actual service, whether captains, masters commandant, midshipmen, surgeons, surgeons' mates, or sailing masters, would be entitled to full pay; and until under orders for actual service, all officers were to be on half-pay only.

To refer the words "said officers" to the thirteen captains, nine masters commandant, seventy-two lieutenants, and one hundred and fifty midshipmen,—which words were introduced into the act to bridle the discretion of the President as to the naval force which he might keep in actual service, in time of peace,—to construe those words of limitation into an obligation upon the President to designate for actual service the ultimate number before they were needed for actual service,—to put all other officers of the Navy upon full pay, whilst such as should be designated in advance for actual service, were to receive no more than half-pay during the time they were not in fact ordered into actual service,—is an exposition in my opinion contrary to the policy and reasonable meaning of the law.

To accomplish the true policy, meaning, and end of the peace establishment, intended by the Congress of the United States, in repealing the second and fourth sections of the act of 3d

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March, 1801, and in substituting therefor the act of 21st April, 1806, whereby officers were to receive no more than half their monthly pay when not under orders for actual service, it is necessary and proper that the words "but the said officers;" shall have reference to all the officers of the Navy retained for service, any and all of whom, as occasion should require, were liable to be ordered into actual service, and not solely to thirteen captains, nine masters commandant, seventy-two lieutenants, and one hundred and fifty midshipmen. Those were the largest numbers which the President could employ in actual service at any one time, in the exercise of his discretion as to the number of frigates and other armed vessels which should be kept in actual service in time of peace. Those numbers, and grades of officers, constituted parts only, not the total, of the officers retained upon the naval peace establishment: all were liable to orders for actual service, at the discretion of the President, and in such numbers and grades and for such lengths of time as he should direct. All not under orders for actual service were to receive only half-pay.

The act of 18th April, 1814, (Stat. at Large, vol. iii, p. 136, ch. 84,) has been cited for the administrator of John Rush, as entitling him to full pay.

This act increases the pay of some few of the officers,—omits the carpenters,—leaves the pay of midshipmen, petty officers, &c., to be fixed by the President of the United States as before,—and omits the component parts of the ration.

The pay of a sailing master by this act is fixed at forty dollars per month, as in the act of 1794. It is an affirmative act; it has no negative words.

Sec. 2 authorizes the President to make an addition, not exceeding twenty per cent., to the pay of officers, petty officers, midshipmen, seamen, and marines, engaged in any service, the hardships and disadvantages of which shall, in his judgment, render such addition necessary.

So far as respects a sailing master, and half-pay to officers not under orders for actual service, there is nothing in the act of 1814 inconsistent with the act of 1806; both can stand together without contradiction.

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The rule is well settled that a later affirmative act does not repeal a prior act, except in so far as it is clearly and indisputably contradictory to the elder one in the very matter. The repugnancy in the former and in the latter act must be such as that they cannot be reconciled; otherwise they both shall stand, and the rule "*leges posteriores priores contrarias abrogant*" can have no application. (Doctor Foster's case, xi Coke, 63-64; i Black. Com. 89; Wood v. U. States, xvi Peters, 362-363; Daries v. Fairbairn, iii Howard, 646; Beale v. Hale, iv Howard, 53.)

A letter of the Hon. Smith Thompson, Secretary of the Navy, of March 1st, 1819, to C. Freeman, Fourth Auditor, is in these words, "You are hereby authorized to allow to all officers of the Navy of the United States, who are not on furlough, full pay and rations."

This letter is relied on by the administrator of Sailing Master Rush, as entitling him to full pay. But the inference cannot be admitted. If an officer was absent from the naval service on furlough, that letter or order of the Secretary did not, in my judgment, entitle such officer to full pay and rations.

A furlough is defined—"Leave of absence." "Leave of absence to an officer or soldier." "Absence from the army (or navy) by permission."

Sailing Master Rush was absent from the Navy, absent from naval duty, by permission of the Secretary of the Navy, because of his known insanity. Such leave of absence was continued to him as an inmate of a hospital for the insane until his supposed death. It is not perceived that the order of the Secretary of the Navy can have any effect to entitle Sailing Master Rush to *full pay*, whilst absent on leave, and in the hospital of the State of Pennsylvania.

That letter of Secretary Thompson shows, however, that he considered the act of 1806, respecting half-pay, as unrepealed by the act of 1814.

Before the date of this letter of Secretary Thompson, the name of Sailing Master Rush had been dropped from the Navy Register upon a premature report of his death.

It appears by a letter on file of 6th July, 1815, from the Hon. Alexander J. Dallas, (Secretary of the Treasury, and act-

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ing as Secretary of the Navy, *ad interim*), that an application had been made to the Navy Department, representing the case of John Rush; and thereupon said Mr. Dallas: "The question has been proposed, whether Mr. Rush's name shall be reinstated on the Navy list for the purpose of entitling him to half-pay."

Mr. Dallas proceeds upon this to observe that "The number of officers of the Navy is limited by law, and even in respect to that number it is provided that the officers shall receive no more than half their monthly pay during the time when they shall not be under orders for actual service. The law clearly contemplates that all the officers shall be capable of actual service if ordered upon duty. An accidental and temporary inability does not of course affect the legislative view of the subject.

"If, then, Mr. Rush has not been disabled in the line of his duty, and if he has been rendered for ever incapable of actual service by the hand of Providence, it would seem that his case is not within the provisions of the acts of Congress.

"Mr. Hamilton, when Secretary of the Navy, has thought that he possessed a discretionary power to allow Mr. Rush to remain upon half-pay without ordering him into actual service, as long as the malady shall continue; that is, probably, as long as Mr. Rush shall live. The constitutional tenure of a judge's commission has produced some difficulty in the removal of a judge disqualified by the infirmities of age, or the visitation of disease; but such a difficulty cannot occur in the executive offices. It is then, I think, a case in which a sound discretion may be exercised; and while there exists a reasonable expectation of a returning capacity for actual service, indulgence should be shown to the unhappy sufferer; when no such expectation exists, the consideration for which half-pay may be allowed has entirely failed, and the feelings of humanity must be controlled by the obligations of duty."

This letter shows that Mr. Dallas considered the act of 1806 as not repealed by the act of 1814; and that a sailing master was within the provision of the act of 1806, allowing only half-pay to officers during the time they were not under orders for actual service.

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Sailing Master Rush became totally disabled from service, not in the line of his duty as an officer, but by an affair of honor, a private combat not sanctioned by law. He was permitted to retain his commission as an officer not under orders for actual service. The United States have paid, for twenty-seven years of total disability, his half-pay. In my opinion, the administrator of Sailing Master Rush has heretofore received the utmost, which was due to his intestate from the United States.

When this case was before my predecessor, it was distinctly presented by the administrator as a claim of arrearages of half-pay. It was considered and adjudged by him in that light; it was submitted to the consideration of Congress as such; and Congress made appropriation for the payment of half-pay, which was accepted by the administrator. I think the administrator then acted on a just appreciation of the whole right of the party, and that the new claim now made for full pay is without foundation in law.

I am, very respectfully,

C. CUSHING.

Hon. JAS. C. DOBBIN,
Secretary of the Navy.

DENATIONALIZATION OF AMERICAN SHIPS.

A registered or enrolled American vessel, voluntarily sold by her owner to a foreigner, and thus denationalized, is, equally with a foreign built ship, incapable of receiving a new register or enrolment, although afterwards purchased and wholly owned by a citizen of the United States.

ATTORNEY GENERAL'S OFFICE,

March 16, 1854.

SIR: Your letter of the 8th instant, presents the single inquiry on the effect of the act of June 27th, 1797, which is in the following words:

“No ship or vessel, which has been or should be registered, pursuant to any law of the United States, and which hereafter shall be seized, or captured and condemned, under the authority of any foreign power, or which shall by sale become the pro-

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perty of a foreigner, or foreigners, shall, after the passing of this act, be entitled to, or capable of receiving, a new register, notwithstanding such ship or vessel should afterwards become American property; but all such ships and vessels shall be taken and considered to all intents and purposes as foreign vessels: Provided, that nothing in this act contained shall extend to, or be construed to affect, the person or persons owning any ship or vessel at the time of the seizure or capture of the same, or shall prevent such owner, in case he regain a property in such ship or vessel, so condemned, by purchase or otherwise, from obtaining or receiving a new register for the same, as he might or could have done if this act had not passed." (i Stat. at Large, p. 523.)

And the question is, whether a registered or enrolled American vessel, voluntarily sold by her owner to a foreigner, must not be thenceforth held incapable of receiving a new register or enrolment, although she may be afterwards purchased and wholly owned by a citizen of the United States.

I think a scrutiny of the language of the act of 1797, and of the other acts of Congress relating to the registry and enrolment of vessels, affords the means of satisfactorily replying to this question.

The act of December 31st, 1792, "concerning the registering and recording of ships or vessels," sec. 2d, enacts that this privilege shall be accorded only to "ships or vessels built within the United States." (i Stat. at Large, p. 288.)

The act of February 18th, 1793, "for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries," (i Stat. at Large, p. 305,) enacts that, in order for the enrolment of a vessel, she shall possess the same qualifications in all respects as are made necessary for the registry of ships or vessels.

So that, down to that year, as since, the condition *sine qua non* either of registry or enrolment was, that the vessel should have been built in the United States.

But the property of a ship, built in the United States, might pass to a foreigner, either by seizure, or by capture and condemnation, or by voluntary sale, and if she afterwards became

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once more the property of a citizen of the United States, he, on the letter of the acts of 1792 and 1795, might, notwithstanding such ship had become for a time denationalized, claim for her a new register or enrolment, on the ground that she was nevertheless built in the United States.

Now the act of 1797 seems, in the most unequivocal and explicit terms to say, that an American ship, having once passed into foreign hands, shall thenceforth be treated as if she had not been built in the United States.

If it does not expressly say and enact this, it is impossible for me to conceive what is its meaning or legal effect.

The words of the act are plain. No ship registered according to the laws of the United States, which shall hereafter be seized or captured and condemned, or which shall by sale become the property of a foreigner, shall be capable of receiving a new register, notwithstanding she may have again become the property of a citizen of the United States.

Here we find recognised two forms of incurable denationalization, namely:— •

First, seizure or capture, and condemnation, by authority of any foreign power;

Secondly, voluntary sale to a foreigner.

There is, to be sure, a proviso. And to what effect? Simply to except one of the many possible incidents of a seizure or capture by authority of a foreign power, namely, the repurchase of the ship by the person who owned her at the time of the seizure or capture and condemnation. That proviso leaves untouched the case of the purchase of a captured and condemned vessel by some citizen of the United States other than the owner at the time of the condemnation. As to any such purchaser, she remains as if not built in the United States. The proviso also leaves untouched the case of a repurchase after voluntary sale, whether the repurchase be by the original owner or any other citizen of the United States. As to any such purchaser also, she remains incapable of receiving a register, that is, incapable of rehabilitation, notwithstanding her having been built in the United States.

It is true, the act of 1797 mentions, in terms, only registered
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vessels. But the act of 1793, which speaks now, and as if enacted to-day, requires the same qualifications for an enrolled as for a registered vessel; and, therefore, whatever circumstances of disqualification attach to the one, attach also to the other.

I am of opinion, therefore, that, under the conditions of the question propounded, a vessel is not entitled to, and cannot lawfully receive, a register or enrolment.

I am, very respectfully,

C. CUSHING.

Hon. JAMES GUTHRIE,
Secretary of the Treasury.

PROSECUTION OF PRIVATE CLAIMS ON FOREIGN GOVERNMENTS.

The Secretary of State has no power to appoint a commission or board to determine how much money a foreign prince shall pay to counsel in the United States for professional services.

ATTORNEY GENERAL'S OFFICE,

March 17, 1854.

SIR: There has turned up, on the examination of some old papers in this office, a letter of the Secretary of State, (the Hon. John M. Clayton), of the 1st of September, 1849, which purports to "submit to the Attorney General the case referred to in the enclosed letter from Mr. W. A. Seely."

The letter of Mr. Seely recites a claim, which he has, against the government, or rather the royal family, of the Netherlands, for professional services as attorney or counsel, remaining still unpaid, and of unliquidated amount; those professional services having reference to certain jewels stolen from the Princess of Orange, which, being brought to this country by the thief, were recovered here and restored to their owner. (See opinions of Mr. Taney of August 4th, 1831; December 20th, 1831; January 7th, 1832.)

Mr. Seely asks that an equitable ascertainment of the claim may be made under the direction of the Department of

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State; which is more explicitly stated in another part of the letter as a request that "a just ascertainment of the amount of the claim might be had upon a fair and open submission on all papers without reserve, and the proofs relative to the entire case, to just and impartial men." So that the request in substance is for the Department to appoint a quasi court or board of arbitrators of "just and impartial men" to ascertain the amount, which the King or the Government of the Netherlands ought to pay to Mr. Seely, as professional fees; and so far as can be gathered from the papers, the legality of this proposition is the question submitted to the Attorney General.

I am not aware that any authority, for the Department to perform such an act, is to be found, either in the laws or usage of our own or any other Government.

If a party have by contract, either express or implied, a claim on the United States, that claim is to be considered and determined by the accounting officers of the Treasury, or by some Head of Department; and, in certain possible contingencies of law, it may become under the supervision of a court of justice.

A Head of Department may, also, through one of his clerks, or through a legal counsel or commissioner *ad hoc*, investigate a claim on the Government; but such investigation can only be for the guidance of his own conscience, without being obligatory on the United States.

Nor, upon the mere presentation of a demand against the United States, can a Head of Department give to the party claimant the right, which the Constitution does not give him, of obtaining, by arbitration or suit, a compulsory judgment against the United States.

But the present demand is against the government of the Netherlands, not against that of the United States. How can the Secretary of State do that for the Dutch government, which he could not do for his own, that is, to appoint a court to adjudicate a demand against that government? I do not see any lawful mode, in which he can do this.

Or, perhaps, the demand is against the King of Netherlands, or a member of his family personally, and not against the go-

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vernment; and, if so, it is still more impossible for me to perceive by what authority the Department of State can appoint a tribunal to ascertain the sum which that person ought to pay Mr. Seely, as upon a special court of *indebitatus assumpsit* for professional fees. There is obvious distinction, both as to right and as to remedy, between a service rendered to a member of the family of the King of the Netherlands, and a service to the constitutional government of the Netherlands.

Mr. Seely refers, in support of his request, to some passages of Vattel, (Bk. II. §§ 343 and 350,) in which that author says that a government, in considering the question of making reprisals on another government, should investigate well the grounds of wrong, to repair which it thus takes redress by its own sovereign will and power. That is very proper and true, as a matter of administrative discretion, in a question either of retortion, of reprisals, or of war; but it does not in any respect touch or approach the specific point of the power of the Department of State to do the particular thing requested by Mr. Seely.

I am, very respectfully,

C. CUSHING.

Hon. WM. L. MARCY,
Secretary of State.

CLERK OF THE CIRCUIT COURT OF THE DISTRICT OF COLUMBIA.

The clerk of the Circuit Court of the District of Columbia, who is also clerk of the Criminal Court of the District, is bound to account to the Treasury for the fees which he receives in the latter capacity.

ATTORNEY GENERAL'S OFFICE,
March 22, 1854.

SIR: I have considered your letter of the 7th of June, and the question it presents, in regard to the accounts of Mr. John A. Smith, Clerk of the Courts of the District of Columbia.

The act, making appropriation for the civil and diplomatic expenses of Government for the year 1842, is in the following words, so far as material to the present matter in:

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"No. 167. For defraying the expenses of the Supreme, Circuit and District Courts of the United States, including the District of Columbia * * * three hundred and seventy-five thousand dollars: Provided, however, that every district attorney, clerk of a district court, clerk of a circuit court, and marshal of the United States, shall, until otherwise directed by law, upon the first day of January and July in each year, * * * make to the Secretary of the Treasury * * * a return in writing, embracing all the fees and emoluments of their respective offices of every name and character * * *, and also embracing the necessary office expenses of such officers, together with the vouchers for the payment of the same * * * which return shall be in all cases verified by the oath of the officer making the same * * *. And no clerk of a district court, or clerk of a circuit court, shall be allowed by the said Secretary to retain of the fees and emoluments of his said office, or, in case both of the said clerkships shall be held by the same person, if the said offices for his own personal compensation, over and above the necessary expenses of his office, and necessary clerk hire included, also to be credited and allowed by the proper accounting officers of the Treasury, a sum exceeding three thousand five hundred dollars per year for any such district clerk, or a sum exceeding twenty-five hundred dollars per year for any such circuit clerk." (v Stat. at Large, p. 483.)

The affirmative clause of the act applies, it is perceived, only to the given year, while the proviso is permanent, being, by its express terms, to stand until otherwise provided by law. Accordingly, the corresponding appropriation, in subsequent acts of Congress, is to be construed as if the same proviso were annually re-enacted. Thus, we are to read the acts making provision for the last and current fiscal years, as if, after the words therein: "For defraying the expenses of the Supreme Circuit and District Courts of the United States, including the District of Columbia," and so forth, there followed in each case the words "Provided, however," and so forth, as in the provision herein before recited.

At the time of the passage of the act of 1842, and for six years afterwards, Mr. Brent was clerk of the courts of the

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District of Columbia; and he made a semi-annual return of his fees in all the courts of which he was clerk, according to the then received construction of the act.

On his death, the present incumbent, Mr. Smith, was appointed. Subsequently, questions arose, first, whether the courts of the District of Columbia are, in any sort, comprehended within the proviso; that is to say, whether the clerk of the courts of the District of Columbia is under obligation to make any return of his fees and emoluments to the Secretary of the Treasury; and, secondly, whether, if obliged to make any return, he may not pretermitt all amount of his fees and emoluments in the Criminal Court of the District.

These two questions were presented to my predecessor, (Mr. Crittenden), for his consideration; and to him, it was elaborately argued, in the first place, that the courts of the District are not courts of the United States, within the meaning of the act, and that therefore, inasmuch as the words "District of Columbia" do not appear in the proviso, no account whatever could be demanded of the clerk of the courts of the District.

Mr. Crittenden, however, decided to the contrary of this, and upon reasoning altogether satisfactory and conclusive to my mind.

It was then argued, in the second place, that if the Circuit Court of the District was to be held as included in the proviso, yet the Criminal Court should not be, because not expressly named in the proviso; and this view of the subject was adopted by Mr. Crittenden.

I feel extremely reluctant in any case to dissent from the opinion of either of my learned predecessors; but I am constrained to do so on the present occasion.

I do not conceive that the omission of the Criminal Court *eo nomine* is any more conclusive of the question than is the omission of the words "District of Columbia."

Under what provision of law are the United States called upon to defray the expenses of the Criminal Court of the District of Columbia? Clearly under this very provision; and if the language of it is sufficient to devolve the expense of that court on the United States, it is sufficient to require an account

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of those expenses, including the clerk's fees, to be rendered to the Treasury. I think it is apparent, from the whole of the provision, that Congress intended the two things to go hand in hand, payment of expenses, and accountability for, and limitation of, the fees and emoluments. Is the criminal court, because not specifically named in the act, to be considered as not included in the appropriation? If so, then the fees of the clerk are not included in the proviso of accountability. Is the criminal court, though not specifically named in the act, to be considered as included in the appropriation? If so, then the fees of the clerk are to be included in the proviso of accountability. I cannot sever the two things; I think it is doing violence to the language of the act to separate them; I think it is contrary to the true legal intendment of the act, as well as to the obvious purpose and policy of Congress.

The truth is, that the district and criminal courts of the District of Columbia are each of them but exfoliations of the circuit court, created by the act of February 27th, 1801, which provided generally for the political organization of the District, (ii Stat. at Large, p. 103.) Subsequently, one of the judges of the circuit court was invested with the power of a district judge of the United States, (ii Stat. at Large, p. 124-126.) At a later period, namely, in 1838, the original "cognizance of all crimes and offences committed within said District" was also branched off, and a separate judge appointed for the transaction of that business, (v Stat. at Large, 306.) In all these modifications of jurisdiction, the successive subdivisions of judiciary continue to be courts of the United States; and their common expenses continued to be comprehended by the phrase of appropriation "expenses of the Supreme, Circuit, and District Courts of the United States, including the District of Columbia."

Now, it would be a singular anomaly of legislation, if the words "circuit court," or "district court," which take from the Treasury of the United States the expenses of the criminal court of the District, do not also carry with them the correspondent rules of accountability and limitation; that a phrase of enactment, which pays the expenses of the circuit court with a condition, should require to be so construed as to pay the

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expenses of the criminal court, but, dropping the condition. I cannot see the reasonableness of such a contradictory interpretation of the same word, in the same act, and under all the other circumstances, tending to establish a rule of logical *exegesis*.

It is not essential for me to go into the considerations of convenience, and just accountability, which apply to the case of a clerk, holding that office for all the courts, and with a necessary mixture of the expenses of all of them; a fact understood by the legislators, undoubtedly, when they prescribed that, though a party may hold a plurality of clerkships, yet he shall have but one salary.

My opinion is, that, upon a just construction of the legal import of the enactment, the expenses of the criminal court of the District are chargeable to the United States, and that, by the same rule of construction, Mr. Smith is bound in law to account to the United States for his fees and emoluments derived from that as well as from the other courts of the District.

I am, very respectfully,

C. CUSHING.

Hon. ROBERT McCLELLAND,

Secretary of the Interior.

 REMEDY FOR ALLEGED ILLEGAL PROSECUTION.

The President has no power to afford pecuniary redress to a party, who alleges abuse of power against him by the Attorney of the United States for one of the Territories.

ATTORNEY GENERAL'S OFFICE,

March 23, 1854.

SIR: I have examined the papers in the case of James Bridges, which you referred to me for that purpose.

It appears that the effects of Bridges, he being at the time proprietor of a trading house in the Territory of Utah, have been taken on a legal process, sued out by the United States Attorney, and served by the Marshal, on a charge against said Bridges for the imputed violation of the laws regulating intercourse with the Indians.

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Mr. Bridges utterly denies that he has, in any instance, violated the laws in question, and alleges that the process of the court was improperly obtained, irregular in form, and illegal in substance.

It is obvious to observe, that whether the process in question be a lawful or an unlawful one, it belongs to the courts of the Territory, in the first instance, to decide upon it; and if it be unlawful, the party has his remedy at law.

I do not perceive anything in the case, therefore, which calls for, or can receive, the special interposition of the President.

I am, very respectfully,

C. CUSHING.

The PRESIDENT.

PASSENGER LAWS.—PARDONING POWER.

Vessels propelled by steam, and employed in the transportation of passengers by sea between Panama and San Francisco, are within the provision of the acts of Congress regulating the transportation of passengers in merchant vessels.

The pardoning power of the President extends to all cases of penalties and forfeitures, as well as other punishment, provided by those acts.

In certain cases, under those acts, forfeitures may be remitted by the Secretary of the Treasury.

ATTORNEY GENERAL'S OFFICE,

March 24, 1854.

SIR: The Secretary of State referred to me some time since for my opinion the petition for a pardon presented by Mr. J. W. Raymond, owner of the steam vessel "New Orleans," libelled for breach of the laws to regulate passenger vessels, which presents two questions of law:

First,—whether the steam vessels, actually employed in the transportation of passengers from the Isthmus of Panama to San Francisco, and from that port to Panama, are within the provisions of the acts of Congress to regulate the carriage of passengers in merchant vessels: and

Secondly,—has the President power to pardon the offences, which have been committed by the masters or owners of steam

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vessels, in violation of the statutes for regulating the conveying of passengers in merchant vessels?

I. Whether these acts apply to steam vessels.

These acts are the following, namely :

1. An act to provide for the better security of the lives of passengers on board of vessels, propelled in whole or in part by steam, approved July 7th, 1838. (v Stat. at Large, p. 394.)

2. The act approved February 22d, 1847, entitled "An act to regulate the carriage of passengers in merchant vessels." (ix Stat. at Large, p. 127.)

3. "An act to amend an act entitled 'An act to regulate the carriage of passengers in merchant vessels, and to determine the time when said act shall take effect,' " approved March 2d, 1847. (ix Stat. at Large, p. 149.)

4. "An act exempting steam vessels employed by the American Colonization Society in transporting colored emigrants from the United States to the coast of Africa, from the provisions of the acts of February 22d, and March 2d, 1847, regulating the carriage of persons in merchant vessels," approved January 31st, 1848. (ix Stat. at Large, p. 210.)

5. "An act to provide for the ventilation of passenger vessels, and for other purposes," approved May 17th, 1848. (ix Stat. at Large, p. 220.)

6. "An act to extend the provisions of all laws now in force relating to the carriage of passengers in merchant vessels and the regulation thereof," approved March 3d, 1849. (ix Stat. at Large, p. 399.)

7. "An act to amend an act entitled, 'An act for the better security of the lives of passengers on board of vessels propelled in whole or part by steam, and for other purposes,' " approved August 30th, 1852. (Acts of 1851-2, p. 61.)

The act of July 7th, 1838, although composing a part of the system for securing the health and lives of passengers to and from the United States, need not be recited, because it contains no regulation as to the number of passengers to be taken on board, and the libel against the "New Orleans" is not founded on any breach of that statute.

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The libel is founded on breaches of the statute of February 22d, 1847, amended by subsequent acts.

This act enacts (sec. 1) "That if the master of any vessel, owned in whole or in part by any citizen of the United States of America, or by a citizen of any foreign country, shall take on board such vessel, at any foreign port or place, a greater number of passengers than in the following proportion to the space occupied by them, and appropriated for their use and unoccupied by stores or other goods, not being the personal baggage of such passengers, that is to say, on the lower deck or platform one passenger for every fourteen clear superficial feet of deck, if such vessel is not to pass within the tropics on such voyage; but if to pass within the tropics during such voyage, then one passenger for every twenty such superficial feet of deck; and, on the orlop deck (if any) one passenger for every thirty such superficial feet in all cases, with intent to bring such passengers to the United States of America, and shall leave such port or place with the same and bring the same or any number thereof within the jurisdiction of the United States aforesaid, or if any such master of vessel shall take on board of his vessel, at any port or place within the jurisdiction of the United States aforesaid, any greater number of passengers than the proprietors aforesaid admit, with intent to carry the same to any foreign port or place, every such master shall be deemed guilty of a misdemeanor, and, upon conviction thereof, before any circuit court or district court of the United States aforesaid, shall, for each passenger taken on board beyond the above proportions, be fined in the sum of fifty dollars, and imprisoned for any term not exceeding one year: provided, this act shall not be construed to permit any ship or vessel to carry more than two passengers to five tons of such ship or vessel.

Sec. 2. "That if the passengers so taken on board of such vessel and brought into, or transported from, the United States aforesaid, shall exceed the number limited by the last section to the number of twenty in the whole, such vessel shall be forfeited to the United States aforesaid, and be prosecuted and distributed as forfeitures are under the act to regulate duties on imports and tonnage.

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“Sec. 3. If any such vessel as aforesaid shall have more than two tiers of berths, or in case, in such vessel, the interval between the floor and the deck or platform beneath, shall not be at least six inches, and the berths well constructed, or in case the dimensions of such berths shall not be at least six feet in length, and at least eighteen inches in width, for each passenger as aforesaid, then the master of said vessel and the owner thereof, severally, shall forfeit and pay the sum of five dollars for each and every passenger on board of said vessel on such voyage, to be recovered by the United States as aforesaid, in any circuit or district court of the United States where such vessel may arrive, or from which she sails.

“Sect. 4. That for the purposes of the act, it shall in all cases be computed that two children, each being under the age of eight years, shall be equal to one passenger, and that children under the age of one year shall not be included in the computation of the number of passengers.

“Sec. 5. The amount of the several penalties imposed by this act shall be liens on the vessel or vessels violating its provisions; and such vessel may be libelled and sold in the District Court of the United States aforesaid, in which such vessel shall arrive.”

The third act, that of March 2d, 1847, chap. 34, repeals the provision that two children, each under the age of eight years, shall be equal to one passenger.

The fourth act applies only to vessels employed by the American Colonization Society in carrying negroes to the coast of Africa from the United States.

The fifth act, that of May 17th, 1848, provides for ventilation, victualing, windows, cooking-stoves, &c., &c., for health and accommodation of passengers, and in sect. 7, that “the collector of the customs at any port of the United States at which any vessel so employed shall arrive, or from which any such vessel shall be about to depart,” shall cause inspection and examination to be made as to the compliance with the provisions of the first, second, third and fifth sections of this act.

“Sec. 8. That the first section of the act, entitled ‘An act to regulate the carriage of passengers in merchant vessels,’ ap-

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proved February 22d, 1847, (ix Stat. at Large, p. 127,) be so amended that "when the height or distance between the decks of the vessels referred to in the said section shall be less than six feet and not less than five feet, there shall be allowed to each passenger, sixteen clear superficial feet on the deck instead of fourteen, as prescribed in said section, and if the height or distance between the decks shall be less than five feet, there shall be allowed to each passenger twenty-two clear superficial feet on the deck; and, if the master of any such vessel shall take on board his vessel in any port of the United States, a greater number of passengers than is allowed by this section, with the intent specified in said first section of the act of 1847, or * * * shall take on board at a foreign port, and bring within the jurisdiction of the United States a greater number of passengers than is allowed by this section, said master shall be punished in the manner provided for the punishment of persons convicted of a violation of the act aforesaid. And in computing the number of passengers on board such vessels, all children under the age of one year, at the time of embarkation, shall be excluded from such computation."

Sec. 10. Repeals the limitation of two passengers to every five tons, contained in the act of 1847.

The act to extend the provisions of all laws now in force relating to the carriage of passengers in merchant vessels, and the regulations thereof, approved 3d March, 1849, enacts:

"That all vessels bound *from* any port in the United States *to* any port or place in the Pacific Ocean, or on its tributaries, or *from* any such port or place in the United States on the Atlantic, or its tributaries, shall be subject to the provisions of all the laws now in force relating to the carriage of passengers in merchant vessels, sailing to and from foreign countries, and the regulations thereof, except the fourth section of the act to provide for the ventilation of passenger vessels, and for the purposes, approved May 17th, 1848, relating to provisions, water and fuel.

Sec. 2. "That the act entitled 'An act to regulate the carriage of passengers in merchant vessels,' approved February 22d, 1847, shall be so far amended as that a vessel passing into, or

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through the tropics, shall be allowed to carry the same number of passengers as vessels that do not enter the tropics.

Sec. 3. "This act to take effect on and after the 15th day of March, 1849."

The seventh act, approved August 30th, 1852, entitled "An act to amend an act entitled 'An act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam and for other purposes,' (Session Acts, p. 61, chap. 106,) requires (sec. 9, par. 4, p. 65,) that the master of every steam vessel, employed in carrying passengers, shall obtain a certificate in the form and manner therein described, in which certificate, among other things, the inspectors are to state 'the number of state-rooms, the number of berths therein, the number of other permanent berths for cabin passengers, the number of berths for decks or other classes of passengers, the number of passengers of each class for whom she has suitable accommodations, and, in case of steamers, *sailing to or from* any European port, or to or from any port on the Atlantic or the Pacific, a distance of one thousand miles or upwards, the number of each she is permitted to carry; and, in case of a steamer sailing to any other port, a distance of five hundred miles or upwards, the number of deck passengers she is permitted to carry, also the number of boilers,' " &c., &c.

Sec. 25 of this act makes it the duty of the collector or other chief officers of the customs to give to the master or owner of the vessel two certified copies of the original certificates, required by the ninth section, one of which the master or owner shall place "in some conspicuous place in the vessel, where it will be most likely to be observed by passengers and others, and there kept at all times."

The obvious policy and intent of these statutes are to secure the passengers, and the communities with which they are to be associated, from the diseases to be contracted on board of vessels overladen, in which passengers are compelled, awake and asleep, to inhale a concentrated, impure, noxious atmosphere,—in confined spaces and small berths, without sufficient ventilation, tending to engender ship-fever and other maladies of an infectious or a contagious character, or otherwise endangering

life. Such diseases are engendered as well in vessels propelled by steam and overladen with passengers, as in vessels propelled by wind acting on sails.

The expression "merchant vessels," used in the titles of the acts, is, in the bodies of the acts, explained as meaning vessels owned by individuals and intended for the transportation of passengers for reward, to the exclusion of vessels owned by the Government of the United States, or by foreign governments, designed for the purposes of war, or other national purposes, such as the transporting of troops, or military stores or provisions, the revenue service, or other objects of public use.

The expressions "from which she sails," and "sailing to and from foreign countries," and "sailing from ports," used in the 3d section of the act of February 22d, 1846, (ix Stat. at Large, p. 128,) in the 9th section of the act of May 17th, 1848, (ix Stat. at Large, p. 220,) and 1st section of the act of March 3d, 1849, cannot be confined to one sense only of the verb "to sail," that is, driven by the wind acting on sails, to the exclusion of the other equally well established meaning of the same verb "to sail," that is, to pass by water,—moving on the water,—conveyed by water.

"Sailing from a port" is used to express the commencement of a voyage; "sailing to a port," signifies the destination of the vessel, or the termination of the voyage, whether the vessel be propelled by wind or by steam. Accordingly, in the act of August 30th, 1852, "for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam, (Sess. Acts, chap. 106, sec. 9, p. 65,) we find: "And in case of steamers sailing to or from any European port," and again—"and in case of a steamer sailing to any other port," the number of passengers she is permitted to carry, and the number of boilers, &c., &c., are to be contained in the certificate and license to such steam vessel.

"If divers statutes relate to the same thing, they ought to be all taken into consideration in construing any one of them." (v Bac. Ab., Statute (I) 3, p. 646; *Stradling v. Morgan*, Plowd. 206; *Vernon's case*, iv Co. 4.)

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The office of a good expositor of a statute is "to make construction on all the parts together, and not of one part only by itself: *Nemo enim aliquam partem recte intelligeret possit, antequam totum iterum atque iterum perlegerit.*" (Lincoln College case, iii Coke R. 59.)

"Where there are different statutes *in pari materia*, though made at different times, or even expired, and not referring to each other, they shall be taken and construed together as one system and as explanatory of each other. So in the laws concerning church leases and those concerning bankrupts. And so I consider all the statutes providing for the four as one system relative to that subject." (Rex v. Loxdale et al., i Burr. 447; same case iv Bacon Ab., Statute (I), pl. 28, p. 467.)

"For the sure and true interpretation of all statutes in general, be they penal or beneficial, or restrictive, or enlarging of the common law, four things are to be discerned and considered. 1. What was the common law before the making of the act? 2. What was the mischief and defect for which the common law did not provide? 3. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth? and 4. The true reason of the remedy. And then the office of all the judges is, always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the act, *pro bono publico.*" (Meydon's case, iii Coke R. 7; Magdalen College case, xi Coke R. 71, 73.)

It is not to be assumed that a general act for the advancement of learning or for the relief of the poor, or for preventing the engendering, introduction, or spreading of contagious and infectious diseases, shall be so construed and expounded that a by-path should be left open, through which to evade the necessary and profitable remedy, leaving the great and dangerous mischief unsuppressed.

The construction, by which the owner of the passenger steam vessel "New Orleans" would confine the statutes solely to

vessels propelled by wind acting upon sails, is repugnant to the rules of exposition, established and used by the sages of the law; it is made upon words culled out and separated from the body of the statute; it disregards the sense and meaning of the statute of 1847, and of the other statutes made *in pari materia*, constituting, together, one system; it would counteract, for the most part, the system of public policy devised by Congress for humanity and the public good; leaving the inhumanities and serious mischiefs, which Congress intended to remedy, unredressed, and continuing *pro privato commodo*: thus permitting the owners of steam vessels to make inordinate profits at the risk of the health and lives of passengers and others.

The statutes limit the number of passengers to be taken on board in proportion to the capacity of the vessel assignable to each passenger and appropriate to his use; if the height or distance between the decks be less than five feet, then twenty-two clear superficial feet on the deck to each passenger; if the height or distance between the decks be less than six feet, but not less than five, then sixteen clear superficial feet on the deck to each passenger; if the height or distance between the decks be not less than six feet, then fourteen clear superficial feet on the deck to each passenger; children, under the age of one year, at the time of embarkation, not to be taken into the computation. And there is another limitation, that the berths for the passengers shall be well constructed and not less than six feet in length, and not less than eighteen inches in width for each passenger.

Such is the effect of the act of February 22d, 1847, as amended by the eighth section of the act of May 17th, 1848, and the second section of the act of March 3d, 1849.

Vessels propelled by steam and employed in the transportation of passengers are, therefore, in my opinion, within the scope of those acts equally as much as vessels propelled by wind acting on sails.

II. Has the President of the United States the power to pardon the offences, which have been committed by the owners or masters of steam vessels in violation of the statutes before cited?

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By the Constitution of the United States, (Art. II., sec. 2,) it is provided the President "shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment."

This power, whatever may be its nature, being vested by the Constitution in the President, cannot be restrained by any act of Congress.

What is a pardon? What is the extent of the power to grant it, or the cases in which it may be applied?

The Constitution itself contains no answer to these questions, —no explanation of the term "pardon."

To understand the meaning and extent of the power to grant pardons, vested in the President of the United States by the Constitution, we must have recourse to the meaning of pardons, established by common consent, custom, and use, antecedent to the formation of that Constitution.

In pursuing that inquiry, we may look, in the first place, to the powers of reprieving and pardoning, as exercised by the respective Governors of the several States, after the declaration of independence and before the formation of the Federal Constitution; and, thence, we shall be referred, in the second place, to the powers, in that respect, which had, upon the declaration of independence, been exercised by the King of Great Britain.

In the case of the *United States v. Wilson*, (vii Peters, 160,) the Supreme Court of the United States, after quoting the constitutional power vested in the President to grant pardons for offences against the United States, say:

"As this power had been exercised from time immemorial by the executive of that nation, whose language is our language, and to whose judicial institutions ours bear a close resemblance, we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person, who would avail himself of it."

"A pardon is an act of grace, proceeding from the power, intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed."

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Legal authorities show that the power of exemption by pardon is limited, 1st, to offences committed, and cannot extend to offences thereafter to be committed, and 2, to those things which belong to the public, so as not to be extended to release and acquit things which are of the private rights and interests of individuals.

As to the first point, it is to be observed that if a pardon could be granted in advance for offences to be committed thereafter, it would include a power to grant indulgences to commit crimes and offences, to license vice, to dispense with the sanction of the laws, without good motive, without reason, but solely by arbitrary will. Whereas the power of pardoning is granted upon a special confidence that the administrator of it will spare those only from punishment, whose case, could it have been foreseen, the legislature may be presumed willing to have excepted out of the general rules, which the wisdom of man cannot possibly make so perfect as to suit the particular circumstances of each special case. (iii Bac. Abr., Pardon (A), p. 802; ii Hawk. P. C. chap. 37, sec. 8, p. 542.)

The mercy of the law may be extended to one who has already suffered a sufficient punishment, or under a belief that, though a part of the penalty of the law be remitted, the purposes of public justice will, nevertheless, have been accomplished.

A pardon is a deed to be accepted, shown, and pleaded by him to whom it is granted, (*United States v. Wilson*, vii Peters, 160.) To every deed these things are essential to give it validity and effect: a grantor, a grantee, and a thing to be granted. A deed for a nonentity would be inoperative and void. A pardon for an offence not yet committed would be void. (Hawkins' P. C. Book ii, chap. 37, sec. 8 & 9, p. 542-3; sec. 28, p. 550.)

On the second point, all the books agree that a pardon cannot be made to release and acquit a private right or interest. Coke, in his Third Institute, chap. 105—of pardons—says: “By the ancient and constant rule of the common law, *non potuerit rex gratiam facere cum injuria et damnum aliorum; quod autem alienum est, dare non potest per suam gratiam.*

“After an action popular brought *tam pro domino rege, quam*

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pro se ipso, according to any statute, the King cannot discharge but his own part, and cannot discharge the informer's part, because, by the bringing of the action, he hath an interest therein; but before action brought, the King may discharge the whole; and, if the action be given to the party grieved, the King cannot discharge the same." (Third Inst. of pardons, ch. 105, p. 237–238; ii Hawkins' P. C., of pardons, ch. 37, sec. 34, p. 553; of information qui tam, chap. 26, sec. 64, p. 392; xvii Viner, Prerogative (U. a. 7); what the King may pardon—(pl. 6, p. 40.)

If a man be bound in a recognisance to keep the peace, and the King pardons him or releases before the peace broken: this is null. (xvii Viner, Prerogative, (U. a. 7,) pl. 7, p. 40; ii Hawkins', chap. 37, sec. 34, p. 554.)

The King cannot pardon nuisances while they continue unreformed, as not repairing bridges or highways, or diverting water-courses, because the subject has an interest. He may pardon fines for the time past, but not for the time to come. (xvii Viner, Prerogative, (U. a. 7,) pl. 15, p. 42; ii Hawkins' P. C. 391, chap. 37, sec. 33; Third Inst. 237.)

By the statute of Westminster, 1st chap. 20, it is provided "for trespassers in parks and ponds that, if any be thereof attainted at the suit of the party, great and large amends shall be awarded according to the trespass, and shall have three years' imprisonment, and, after that, shall make fine at the King's pleasure, and then shall find surety that, after he shall not commit like trespass," (Second Inst. 198.) "Thereupon it is adjudged that both damages and imprisonment concern the plaintiff, and therefore the King's pardon cannot dispense with them; but the ransoms, the finding of surety, &c., are *punishments exemplary*, and concern the King, and therefore he may pardon them." (Second Inst. 200, point 6; xvii Viner, Prerogative, (U. a. 7,) pl. 16, p. 42; ii Hawk. ch. 37, sec. 29, p. 551, sec. 39, p. 555.)

Bearing in mind the restrictions before mentioned, and others falling within those general principles, it may be laid down as a general rule, conceded in all the books, that the King "may.

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pardon any offence whatever, whether against the common law or a statute, so far as the public is concerned in it, after it is over; and consequently may prevent a popular action on a statute by pardoning the offender before the suit is commenced; but it seems that he cannot wholly pardon a public nuisance, while it continues such, because such pardon would take away the only means of compelling a redress of it; yet it is said that a pardon will save the party from any *fine* to the time of the pardon.

“But it seems agreed that he can, by no previous pardon, license, or dispensation, make an offence dispensable, which is *malum in se*, or against the law of nature or the public good; and that a pardon of this kind, tending to encourage the doing of evil, which it is the chief end of government to prevent, is plainly against reason and the common good, and therefore void.” (Bac. Ab., Pardon (B), p. 406; ii Hawkins’ P. C., chap. 37, sec. 38, p. 550, and sec. 33, p. 553.)

A pardon is an act of mercy, which may be granted before suit, indictment, conviction, or attainder, or afterwards. (Third Inst. chap. 105, p. 233; ii Hawkins’ P. C. pardon, chap. 37, s. 9, p. 543; United States v. Wilson, vii Peters, 162.)

A pardon may be conditional. The President may extend his mercy on whatever terms he pleases, and may annex a condition, either precedent or subsequent, on the performance of which the validity of the pardon depends. The offender may accept or not at his option; for “the condition may be more objectionable than the punishment inflicted by the judgment.” (ii-Hawkins’ P. C. chap. 37, sec. 45, p. 557, and sec. 59, p. 559; iii Bac. Ab., Pardon (E), p. 807; United States v. Wilson, vii Peters, 160–161; Coke Litt. 274 b.)

It may be pleaded in bar of an indictment or in arrest of judgment, or after sentence, (iv Blacks. Comm. 347.)

That the President, therefore, has power, by the Constitution, to pardon or remit the fines, penalties, and forfeitures which have been incurred by the master or owners of the “New Orleans,” upon such conditions and terms as he may prescribe, is, in my mind, clear of doubt.

If the prosecution, in this case, were for the offence described

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in the second section of the act of February 22d, 1847, which forfeits the vessel and provides for the distribution of the value as if she had been seized and forfeited under the revenue laws, then it would present the question, whether the President has authority to remit, by pardon, a penalty accruing to individuals, and also whether he should interpose the pardoning power in cases which admit of application to the Secretary of the Treasury. But these questions do not arise here, and it will be time enough to decide them when they shall be distinctly presented for consideration.

I have the honor to be, very respectfully,

C. CUSHING.

The PRESIDENT.

UNADVERTISED CONTRACTS OF THE DEPARTMENTS.

Semble, If the provisions of law which require certain contracts to be advertised are disregarded, that the contracts, while they remain executory, and without commencement of performance, are subject to be rescinded.

ATTORNEY GENERAL'S OFFICE,

March 24, 1854.

SIR: Your letter of the 20th instant presents the following question:

A contract was entered into, on the 25th of May, 1852, between the Treasury Department and Mr. Charles Knap, for the supply of cast-iron and wrought-iron work for the custom house at Charleston, in the State of South Carolina.

The contract provides, that the said iron-work shall be delivered from time to time as ordered. None of it has yet been required or furnished. Of course, the contract was, and remains, wholly executory.

You say "This contract appears to have been made without previous public advertisement," and inquire: "Are the United States bound by a contract so made?"

I have looked through the successive annual appropriations for the construction of this custom house, beginning in 1847, and terminating in 1853, without finding connected with those

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appropriations any special provision bearing on the question, which must, therefore, be determined by the general acts of Congress.

The act of March 3d, 1809, provides, among other things, that "all purchases and contracts for supplies or services which are, or may, according to law, be made by, or under the direction of either the Secretary of the Treasury, the Secretary of War, or the Secretary of the Navy, shall be made either by open purchase, or by previously advertising for proposals respecting the same." (ii Stat. at Large, 536.)

The nature of the distinction between open purchase and contract requiring advertisement, has been repeatedly considered and determined.

Mr. Berrien's exposition of this subject may be taken as the settled rule, namely, that when the public exigencies do not require the immediate delivery of the articles, or performance of the service, in such cases, it is necessary previously to advertise for proposals respecting the same. (Opinion, August 29th, 1829.)

The present contract, it is undeniable, comes within the description thus given of those which require previous advertisement.

There is room for doubt whether this provision is directory merely, or absolute, that is, whether the making of such a contract, without advertisement, drew after it the consequence of nullity, or only that of irregularity in the action of the Department.

Some aid of construction in this respect may be derived from a clause in the act of August 31st, 1852, to the following effect:

"All contracts of every description, which have been made without public notice having been given when public notice was required, shall be cancelled after sixty days' notice having been given in the newspapers of this city." (Session Acts, 1851-2, p. 3.)

Mr. Crittenden has expressed the opinion, that this provision applies only to contracts to be executed in the City of Washington. (Opinion of September 8th, 1852, MS.)

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I do not think that perfectly clear. The clause quoted is very general in terms, although associated with legislation of a temporary, and in some other respects questionable character. (See my opinion of May 6, 1853, ante, p. 32.)

However that may be, and without discussing the general question, it seems to me, on the whole, that you have a right to consider this merely executory contract as open to revision for want of legality of form, and to assume it as not obligatory on the United States.

I am, very respectfully,

C. CUSHING.

Hon. JAMES GUTHRIE,
Secretary of the Treasury.

PARDONING POWER.

After return of execution on scire facias against the surety of an absconding criminal, charged with violation of acts of Congress, the only mode of relieving the surety is by exercise of the pardoning power of the President.

ATTORNEY GENERAL'S OFFICE,

April 3, 1854.

SIR: The application of David M. Gazlay, for pardon, presents the following facts and considerations of law applicable thereto, namely:

Gazlay was surety on the recognisance of a deputy postmaster, charged with criminal violation of act of Congress, who had failed to appear at the appointed time.

The principal and surety being both defaulters, judgment was recovered against the surety on scire facias, and execution issued thereon, to which return of *nulla bona* has been made.

If the case comes within the provision of any act, by which the question of remission of the forfeiture can be submitted to the courts for decision, or to any Head of Department, it would not be desirable that the President should be called on to interpose with the pardoning power.

Obviously, it is not of the class of cases in which the Secretary of the Treasury can remit; for those are only where any

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vessel, goods, wares, or merchandise, shall have been subject to seizure, forfeiture, or disability, by force of any law of the United States for the laying, levying, or collecting of duties or taxes, or any act concerning the registering or recording of ships or vessels, or the enrolling and licensing the same, (i Statutes at Large, 596, and iv Ibid. 497,) and some other special cases of ships or vessels.

It has been suggested that the provisions of the 6th section of the act of February 28th, 1839, apply; but an examination of that act demonstrates the contrary.

There, the courts of the United States, in which recognisances in criminal cases, taken for, or in, or returnable, in the same, shall have been forfeited, have authority to remit the penalty in whole or in part, "whenever it shall appear to the court that there has been no wilful default of the parties, and that a trial can notwithstanding be had in the cause, and that public justice does not otherwise require the same penalty to be exacted or enforced." (v Stat. at Large, 322; see U. S. v. Freeley, i Brock. 255.)

But in the present case the proceedings have passed beyond the stage, at which the court could remit, for it has reached the final point of return of execution to judgment in scire facias; and in my opinion the only relief which can be given to the party is by pardon, if the President should perceive in the facts adequate reason to exercise here his constitutional authority in that respect.

I am, very respectfully,

C. CUSHING

To the PRESIDENT.

MARSHAL OF FLORIDA.

The Marshal of the United States for the southern district of Florida cannot at the same time hold the office of Commercial Agent of France.

ATTORNEY GENERAL'S OFFICE,

April 3, 1854.

SIR: A letter of Mr. Moreno, appointed Marshal of the Uni-

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ted States for the southern district of Florida, addressed to Mr. Marcy, has been recently brought to my notice, in which Mr. Moreno states that he has been acting as Commercial Agent of France, and inquires whether the two offices are compatible; and I have the honor to state that, in my opinion, they are not:—it being the precise case of the 9th section of the 1st article of the Constitution, which provides that no persons, holding any office of profit or trust under the United States shall, without the consent of Congress, accept of any emolument or office from any foreign prince or state.

I am, very respectfully,

C. CUSHING.

Hon. S. R. MALLORY,
U. S. Senator.

MAIL CONTRACTORS.

The sureties of a mail contractor are responsible to the Government for the whole term of the contract, and as well after the death of their principal as before.

ATTORNEY GENERAL'S OFFICE,
April 5, 1854.

SIR: Your communication of the 3d instant submits to me the question "whether the sureties in a mail contract, in case of the death of the principal before the expiration of the term for which said contract was made, are bound to fulfil its stipulations, or, in case of non-fulfilment, are liable for the damages which may ensue from letting it to another at a higher price?"

The blank form of mail contracts, transmitted with your letter, purports that "the contractor and his sureties do jointly and severally undertake, covenant, and agree with the United States, and do bind themselves" to and for the several conditions of transportation of the mail and other incidental duties and legal consequences, as set forth at large in the contract.

It is a contract of mutual obligations, each opposite engagement being the consideration of the other,—a complete commutative and reciprocal contract, in which, for due consideration

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on both sides, the principal and sureties are alike bound to the United States.

Now, in general the contracts of a deceased person are not affected by his death, and his executors and administrators are required to fulfil his engagements, and may enforce those in his favor. (*Bouvier's Dic. Death*; *Chitty on Contracts*, p. 96.)

Nor is it material whether executors and administrators are or not named in the contract. (*Wentw. Off. Ex.* ch. 11; *Williams on Executors*, 1466.)

Thus if A. is bound to build a house for B. previous to such a time, and before that time A. dies, his executors are bound to perform the contract. (*Pr. Coke*, ch. 9, in *Zurich v. Ludlum*, 1 Rolle's R. 196.)

So of an engagement of a contractor to supply slate, at a given quantity per month, and the contractor dying before all the monthly deliveries have been reached and executed. (*Wentworth v. Coke*, x A. & E. 42.)

The general rule is laid down by Parke, J., thus: Executors are responsible on all the contracts of the testator, broken in his lifetime, and there is only one exception with regard to their liability for contracts broken after his death; that is this, that they are not liable in those cases where personal skill or taste is required. (*Siboni v. Kirkman*, i M. & W. 419.)

Doubts may sometimes arise on the point as to what contracts are merely personal, and die with the party; and that is a question of law.

The examples given in adjudicated cases are sufficient to show what is in its nature a merely personal contract. Such is a contract to compose a poem or other work of authorship. (*Marshall v. Broadherst*, i Tyrwh. 349.)

A contract for the construction of a lighthouse is said in one case to have been held to be personal, because of its being a matter of professional science. (*Per Patteson, J.*, in *Wentworth v. Coke*, x A. & E. 35.)

I think the present contract is not a personal one, but descendible to the executors of the deceased.

Of course, inevitably, the obligation of the sureties continues after the death of the contractor; for their liabilities are co-extensive with his. (*Poth. Oblig.* pt. ii, c. 6, § 6.)

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A vague idea is found obscurely existing, in some quarters, that the death of the principal in a contract discharges a surety, for impossibility of performance by reason of the act of God. This notion appears in the argument of counsel in the case of the *United States v. Tillotson*, (1 Paine's C. C. R. 305,) which arose out of a contract with the War Department for work and supplies on a fort.

The history of the case manifests that the contract had been treated on both sides as descending to the executors of the deceased contractor. Other incidents occurred, which, in the judgment of the court, discharged the sureties, and the question raised by counsel as to the effect of the death of the principal on the obligation of the sureties was not decided. But all the cases cited to this point by counsel were of the principal contract discharged by the death of the principal, not of the discharge of the surety; as for instance, of the contract of A. to marry B., which is discharged by the death of B. The familiar authorities to the point, that impossibility of performance discharges a contract, do not affect the present question, which is of the discharge of the surety.

Now, we have already seen that death does not in general put an end to contracts, but the contrary. A contract in general descends to the executor, whether it be money to pay or money to receive; a thing to do, or a thing to have done. It ceases with the life of the party, only when, as already explained, the thing to be done is of a personal nature. It is impossible for a dead man personally to pay a debt; but a contract, by a party for the payment of the money, is of possible performance after his death by his executor, and if not paid by his executor, must be paid by the surety of the deceased principal. The surety is intended in law to know this, and to engage, equally with the principal, for the performance of the contract, and to see it performed, or to take the consequences of the omission, in case of the death or other disability of the principal contractor.

There is nothing in the fact of the death of a principal, which discharges a surety. No such cause of discharge appears in any of the special treatises on the relation of principal and surety.

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On the contrary, the books abound with cases conforming to the general doctrine of law, that the accessory engagement follows the fate of the principal one, and in which the living surety or his executor is held responsible for the continuing engagements of a deceased principal.

In the present contract, the engagement is joint and several, and, therefore, although some of the parties are sureties in relation to one another, and to the principal contractor, yet they are all equally and alike principals so far as regards their obligations to the United States. (Rivurge on Suretyship, bb. vi.)

I am of opinion, therefore, that the sureties of a mail-contractor are responsible to the Government for the whole term of the contract, and according to its conditions and limitations, as well subsequently to, as before, the decease of the contractor.

I am, very respectfully,

C. CUSHING.

Hon. JAMES CAMPBELL,
Postmaster General.

STEINER'S CASE.—CIVIL RESPONSIBILITY OF THE ARMY.

An officer or soldier of the Army, who does an act criminal both by the military and the general law, is subject to be tried by the latter in preference to the former under certain conditions and limitations.

But his conviction or acquittal, by the civil authorities, of the offence against the general law, does not discharge him from responsibility for the military offence involved in the same facts.

ATTORNEY GENERAL'S OFFICE,

April 7, 1854.

SIR: Your note of the 5th instant, with the accompanying letter of Captain Blair, and the memorandum filed to-day by the Judge Advocate, Major Lee, exhibits the following state of facts:

On the 6th of September, 1853, Assistant Surgeon Josephus M. Steiner killed Brevet Major R. A. Arnold, at Fort Graham, in the State of Texas, each of those officers being at the time on duty at that station, and Brevet Major R. A. Arnold the

commandant of the post, and the immediate superior of Steiner. Consequently upon this event, sundry proceedings were had, on the part both of the military authorities of the United States and the civil authorities of the State of Texas, with a view to the trial of Steiner for this act or some of its incidents.

Steiner has been indicted for the act by the finding of a grand jury returned to the proper court in Texas, and he is now (so far as regards the civil courts) at large on bail, his trial standing postponed until June.

Meanwhile, a court martial has been ordered to assemble on the 17th instant, by Brevet Major General Smith, commanding the military department in which the act of homicide was committed, for the trial of Steiner on the charges of mutiny and breach of arrest.

These general facts raise the whole question of the relation of the civil to the military authorities in such a case, and especially of the duties and the rights of the Army in the premises.

In the view of the subject, which presents itself to my mind, it is not important to inquire into the successive changes in the personal condition of Steiner, as whether, at this or that time, lawfully in the custody of the civil authorities, or lawfully held as an officer under military arrest, or confinement, nominal or effective, or of the precise order of these particular circumstances.

If, indeed, it were a question between competing civil judicatures, then the rule of law would apply, that the first court lawfully in possession of a criminal is entitled to proceed with him for the specific offence; provided that any other court, having lawful jurisdiction, may proceed against him at the same time for another offence, or for another criminal qualification of the same act; but the latter court cannot take the custody of his person away from another court whose jurisdiction has lawfully attached. At the first mention of the case, this analogy came into my mind; but, on reflection, it seems to me that, although the doctrine of priority of possession of a case will solve some of the secondary questions involved, yet the primary questions depend on other doctrines and rules of law.

The military law, as it exists in the United States, and in

Great Britain, from which country the substance of our jurisprudence was derived, is an exceptional code, applicable to a class of persons in given relations, but not abrogating or derogating from the general law of the land. By the general doctrine of American as well as of British law, an officer or soldier of the Army, who does an act which is criminal both by the military and by the general law, is subject to trial by the latter, in preference to the former, under certain conditions and limitations.

This doctrine is apparent on the face of the 33d of the Articles of War, which, under the limitations of demand by the civil magistrates hereafter to be commented on, subject every commissioned officer and soldier to trial by the civil authorities, when he "shall be accused of a capital crime, or of having used violence, or committed any offence against the person or property of any citizen of the United States, such as is punishable by the known laws of the land."

Now, every act of unlawful homicide is "punishable by the known laws of the land," and such an act, therefore, by the very terms of the Articles of War, is triable by the civil magistrate, notwithstanding it may have been committed by an officer of the Army.

It is no answer to this to say that the party killed was a fellow officer or a superior officer, and that therefore the criminal is guilty of, and punishable for, the military crime of mutiny. Neither the general law nor the tenor of the 33d Article makes reservation as to the act punishable by the known laws of the land. The language of the article itself is full, complete, and comprehensive. It does not pretend to speak of acts not punishable by military law,—acts which are external to the Army only. How could it? Is it possible for an officer to do any act, punishable by the known laws of the land, however foreign that act may be to his duties or immediate relations as a soldier, which shall not be cognisable by court martial? I think not. To commit a crime of any sort is, to say the least of it, in general, unofficerlike and ungentlemanly conduct. Undoubtedly, cases may and do occur, of assault, or even of homicide, by an officer of the Army, which constitute a tech-

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nical crime at law, the facts of which, when they come to be scrutinized by the eye of a court martial, would be held the reverse of criminal, and highly honorable to the party accused. These are exceptional cases. The general position remains true, that it is the part of an officer and a gentleman to observe the laws of his country; and for not doing it, he would, in most cases, be censurable, and in all his conduct would be lawfully subject to military inquiry. So that, if the article had undertaken to distinguish between acts within the Army and acts external to it, and had provided for the surrender of an officer to the civil magistrate in the case of an act "punishable by the known laws of the land" *alone*, it would have nullified itself; for no such act can exist.

The conclusive test of the doctrine is this: Suppose an officer of the Army to be under indictment for alleged murder, could he plead in bar of the indictment that the murdered party was his superior officer, that he is liable to charges and trial by court martial for mutiny, and that therefore, he shall have immunity from trial at common law? I apprehend no jurist will say this; the crime of murder has, by our law, no sanctuary anywhere, and most of all, no sanctuary in the ranks of the Army.

It must be conceded that an officer or soldier of the American Army, on his committing, within the United States, an act "punishable by the known laws of the land," is subject to be tried and punished for that act, according to those laws, that is, by the competent, ordinary tribunals of the State or Territory in which the criminal act was perpetrated.

The same conclusion is deducible from examination of the law on this point, as understood in Great Britain.

Our Articles of War, it is notorious, are founded on the provisions of the British Mutiny Act, and frequently copy its very words: and the 33d article herein cited has its parentage in a correspondent article of the Mutiny Act.

The Mutiny Act being of annual enactment in Great Britain, some variation occurs in its phraseology from time to time; but all the successive enactments, which it has been convenient for me to consult, contain some provisions recognising that crimes

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of violence are punishable by the laws of the land as contradistinguished from the military code.

I have carefully verified the point by inspection of the act of 4th Geo. IV., 6th Geo. IV., 3d Gul. IV., and the whole series of the acts of Victoria.

Thus, for example, the acts of George and William expressly provide that nothing in the act shall extend or be construed to "exempt any officer or soldier whatsoever from being proceeded against by due course of law."

The more modern statutes are less detailed on this point than the previous ones; but still they recognise the triability of an officer or soldier for crime by the civil magistrate, and his being taken out of the service "by process on account of any charge of felony or of misdemeanor committed with violence to the person, property, or effects of any of Her Majesty's subjects." See Mutiny Act, iv Vict. cap. 6, s. 51, 52.

All the many special treatises on military law, which have passed under my eye, recognise the general doctrine, or allude to it in some form.

The theory of the British articles of war is identical with ours, to wit, that officers and soldiers of the Army continue subject to the civil law, that the latter is to have the preference in the contingency of lawful competition of cause, and that the officer who commits a crime shall be punishable both as a citizen and as an officer of the Army. (Simmons on Courts Martial, ch. 2.)

For the civil responsibilities of an officer or soldier do not impair his military ones. The obligations are not reciprocally exclusive, but collateral and cumulative. An officer of the Army is bound by the law to be a good citizen, and therefore liable, under such qualifications as the law prescribes, to the same punishment with any other citizen for a given act. But he is also bound by the law to be a gentleman, and an officer, whether in or under command; and if he fail in this, whether the act in which he fail is punishable or not, or punished or not, by the civil magistrate, it is to be punished by military law, according to the sentence of his fellow officers, in subordination always

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to the supervising authority, in the last resort, of the President of the United States.

The British articles, while they expressly recognise the liability of the officer or soldier to be tried by the military authorities, after having been tried for the same act by the civil magistrate, and whether he be acquitted or convicted, proceed to limit the punishment, to which in that case he may be subsequently sentenced, and say that it shall stop at cashiering. No such limitation occurs in the correspondent provision of our articles; that is to say, according to the general rules of law, the party, notwithstanding a trial by the civil authorities, remains subject to his ordinary military obligations, *with a statute* limitation of ulterior punishment in Great Britain, *without* such express limitations in the United States.

I have said that the treatises on this branch of law sustain the foregoing conclusion. Some of these it may be not amiss to cite.

Tytler says, "The martial or military law, as contained in the Mutiny Act and Articles of War, does, in no respect, either supersede or interfere with the civil and municipal laws of the realm. * * * Soldiers are, equally with all other classes of citizens, bound to the same strict observance of the laws of the country, and the fulfilment of all their social duties, and are alike amenable to the ordinary civil and criminal courts of the country, for all offences against those laws and breach of those duties. It follows, therefore, that no crime for which the common or statute laws of the country have provided a punishment, is cognisable before a court martial; nor can the military power interfere to prevent the punishment of any soldier guilty of such offences, or supersede by any judicial procedure in a court martial, the ordinary effects of the laws of the country, unless in those extraordinary cases in which the legislature may find it necessary to proclaim martial law, &c." (Essay on Military Law, p. 153, 154.)

But again, in speaking of the limitation of punishment by court martial after punishment by the civil courts, he says:

"It is not to be thence inferred that a criminal (officer or soldier) tried and convicted by the civil power, is to be tried a

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second time for the same offence; but upon proof being brought of his conviction of a crime before the civil court, which renders him unfit for, or unworthy of, the honorable profession of a soldier, he may on that ground be cashiered or dismissed * * by a court martial." Ibid. p. 156.

That is to say, the Articles of War do not punish forgery or libel *as such*; but they may punish the same act as a breach of military law or discipline.

To the same effect McArthur says:

"The military law is subordinate to the civil and municipal laws, * * * and does not in any way supersede those laws, but they materially aid and co-operate with each other, for the good order and discipline of the Army in particular, and for the benefit of the community in general." (Naval and Military Courts Martial, vol. i, p. 38.)

But for a recent decision of the Supreme Court of the United States, it might have become necessary to enter into argument to show that a given act, triable by one law, or before one forum in some of its relations, was not the less triable in other relations, by a different law, before a different forum. Indeed, a doubt, on this point, might arise from a *dictum* in the opinion of one of my predecessors. This doubt, however, is removed, and the point is decided in favor of the double trial, by the case of *Moore v. The State of Illinois*. (xiv Howard, p. 13.) That is to say, the rule of the military law which decides that an officer or soldier, though tried, on the act of killing his superior officer, for murder by the civil magistrate, is not the less triable afterwards for mutiny by the military law, is in complete accordance with established rules of common civil jurisprudence.

There is a *dictum* of Mr. Justice Woodbury in a previous case to the effect, that the proceedings of a court martial are a bar to subsequent process in the courts of law, "for the same offence." (*Wilks v. Dinsman*, vii Howard, 123.) That may be so, in the strict meaning of the words, "same offence." But the position cannot be admitted, if intended to cover all the criminal relations of the same act. An officer, on account of one and the same act, may be tried for assault at common law,

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and for ungentlemanly conduct by the law martial, and either may precede the other.

The case of *Moore v. The State of Illinois*, disposes of the question of *autrefois acquit* or of *autrefois convict* at common law, or of double jeopardy of life and limb for the same offence in the amendments of the Constitution; for the court say unequivocally, that when an act offends against two jurisdictions, and has distinct criminal relations by each, "either or both" of the jurisdictions may punish the act, it being the case of punishment of two offences, not of two punishments for one offence. (xiv Howard, p. 21. See cases collected in Waterman's Archbold, vol. i p. 111, notes.)

The doctrine of this case appears to be in perfect accordance with that laid down in the case of *Houston v. Moore*, (v Wheaton, p. 1,) upon which Mr. Rawle very well remarks, "that immunity from one crime cannot be obtained by proving that, in doing the act, the party committed another." (Rawle on Const. p. 208.)

Hence, therefore, it is a capital mistake for an officer of the Army to suppose that, being guilty of a crime, he gains anything, in a military sense, by the interference of the civil magistrate.

The civil magistracy is, under some circumstances, entitled to try him by preference of time, if it will, and to the custody of his person until its jurisdiction be exhausted. But the military obligations of the party are not extinguished on his committing a crime of which the civil magistrate has cognisance. The soldier who robs a hen-roost, and is prosecuted for theft by the party injured, and put under his recognisance to appear at the sessions and take his trial, does not cease, thereupon, to be a soldier amenable to military duties; nor does the officer who commits murder, and is indicted therefor by the courts of law. In either case, so long as the civil magistrate holds the party in actual physical custody, he holds him rightfully; and the military authorities are bound to aid the civil magistrate in this respect. But, if the party escape from the sheriff,—or if he be released on bail,—or if he be tried and acquitted,—or if he be tried and convicted,—in each of these cases, so soon as he leaves

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the manual custody of the civil magistrate, he reverts to the authority of his military superior. In all the predicaments of life, he continues to be *sub vexillo*. The *sacramentum militare* clings to him indissolubly, on duty or off duty, in camp or on the battle field, at the head of troops or a prisoner of war, alike at the summit of fame or in the felon's cell, until he is discharged by death, or by the lawful act of the President. He struggles in vain to shake it off. Every breach of his arrest is a fresh ground of charge. Every new attempt to evade his military duty by flight is but a new act of desertion. Collusive contrivances to embarrass the military authorities by means of the undue or unlawful interference of the civil magistrate, and thus to run for luck in quest of chances of escape from a fair trial by court martial, are themselves a distinct military offence. Each successive act of insubordination to the commands of the law is an additional crime. Such is that inexorable law of military duty and military honor, which constitutes the very essence of the discipline of an army.

Questions may arise on the Articles of War as to the precise circumstances under which an officer or soldier, having violated the law of the land, is to be delivered up to the civil magistrate. According to the express tenor of the Articles, it is "upon application duly made by, or in behalf of, the party or parties injured." That application, in all ordinary acts of violence, or injury to the person or property of a third party, is the necessary antecedent condition of the right of the civil authorities to act. It is not any right of the criminal, but of the party injured, for which the Article provides. The military authorities, in case a soldier strikes his superior officer for instance, are not bound to deliver up the soldier to be tried by assault at common law, and so to escape trial for the higher crime of mutiny by the military law. The civil magistrate has no right to demand the accused in such case, unless upon application by, or in behalf of, the party injured. The law does not give the civil magistrate any right of voluntary and officious interference in these matters. No such thing is contemplated by the British Mutiny Act, or by the American Articles of War. The law does not enact that whenever a soldier strikes an officer,

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or an inferior officer his superior, the civil magistrate may interpose, on the application of the criminal or his friends, to embarrass and obstruct the military authorities. To enact that, would be to put an end at once and for ever to all discipline in the Army. (Samuel's British Army, s. 11.)

The case of murder, or other felony, will admit of being distinguished in this respect from ordinary acts of violence, whether committed without or within the Army.

Suppose that a soldier, stationed at Boston or New York, perpetrates an act of murder, rape, robbery, or burglary, upon the person or property of a person not in or attached to the service: can there be any doubt in such case that the law of the land, through the public prosecutor or the grand jury, represents, and takes the place of, a private party injured? I conceive not, for in such a case the entire society is the party injured. A commanding officer would scarcely hesitate, in such case, to surrender the criminal to the public authorities of the State.

Suppose, again, that the act is internal to the Army, as that an officer on duty kills a superior officer. Beyond all doubt, as we have seen, that act, though mutiny by the law martial, would still be murder by the ordinary law, and so triable as such by the civil magistrate. There, also, the whole society is a party injured, and the public prosecutor may justly demand that the criminal shall be held amenable to the aggrieved majesty of the law of the land, either with or without a technical conformity of proceeding to the letter of the Articles of War.

Inquest of murder, therefore, in general, does not present the same difficulties of conflict of jurisdiction, or competition or priority of time, which other cases might do. If the civil magistrate has become *de facto* seised of a case of murder,—if indictment is pending,—if the accused is thus in the actual jurisdiction of the law of the land,—it is not material to the validity of the proceedings at law, and the right of the magistrate to go on according to the *lex loci*, whether the party passed into the hands of the magistrate regularly, by the act and with the consent of his commanding officer, or whether by breach of arrest of the party, desertion, or any other violation of military duty;

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it being remembered always, that whenever he ceases to be in the actual custody of the civil magistrate, he reverts *eo instante* to that of his commanding officer.

If a case should arise, in which the civil magistrate may seem to interfere, collusively, either in purpose or manner, to screen the offender from condign punishment, instead of to secure its infliction, such an accident of exceptional fact would not suffice to do away with the legal principle, which, in this country, presides over the mutual relations of the military and the civil authorities, in virtue of which, while the officer is amenable to the particular corporation of which he is a member, and its special laws, he is not the less amenable to the entire political society, whether represented by the Federal Government, or, in a multitude of relations, by the separate States.

On the other hand, it may happen that the civil magistrate shall interpose too late to be entitled to take jurisdiction. Suppose, for instance, that an officer or soldier has been convicted and sentenced by court martial on account of an act which is criminal by military law, and also by the general law. It will not answer to say that in such a case, and at such a stage of it, the civil magistrate may interfere. That would be to defeat, not to promote, the ends of justice. Nay, if the court martial has gone only so far as to have arraigned the party, and he has pleaded to the merits, accepting the jurisdiction, it seems to me that the civil magistrate cannot, then, interpose to try the act, though the supervising power of some superior court might interpose, perhaps, in some way, pending the court martial, and before it has completed its finding and sentence. (In the matter of John Waller Pole, v B. & Ad. 681.) For the jurisdiction of the court martial, though a special, is yet a lawful one;—though, like all other special jurisdictions, it be subordinate to the general law of the land, yet its concurrent jurisdiction is complete so far as it extends. Accordingly, the superior courts, in Great Britain, accept the return to a writ of *habeas corpus*, and discharge the writ, when the return shows that the body of the party is held by virtue of the sentence of a court martial acting within its lawful jurisdiction. (*Rex v. Suddis*, i East, 306.)

It is to be hoped that the courts of the State of Texas may not be induced to embarrass the military authorities in this case by the writ of habeas corpus. The unreasonable opposition, in some of the States, to the performance of the constitutional and legal duty of the extradition of fugitives from service, has led to this high prerogative writ being so vulgarized and cheapened, by placing it in many hands, that, being equally applicable to arrested criminals, it has come, in many cases, to be used most mischievously as the means of taking malefactors away from the custody of the proper jurisdiction, and proceeding without due judicial discretion to discharge them untried, to the utter subversion of justice, and with special injury to the jurisdiction of the courts of the United States.

As the only means of maintaining the authority of the latter, it has been found indispensably necessary, in more than one case recently, to instruct and advise an officer of the United States, having lawful custody of a prisoner under its authority, to refuse to obey the writ, and thus to invite such an issue as might bring the matter before the Supreme Court of the United States.

In Great Britain, as we have seen, the superior courts of common law exercise a supervisory or quasi appellate jurisdiction over military courts, by prohibition or other appropriate forms of law.

What relation the Supreme Court, or other courts of the United States, have to courts martial, is a question which does not appear to have undergone adjudication in the United States.

In the States, however, the relation of the ordinary courts to the military ones has been the subject of much and frequent consideration.

Thus, in Massachusetts, although the Supreme Court has a statute jurisdiction by certiorari, mandamus, and prohibition, to courts of inferior jurisdiction, generally, including criminal ones, yet the law is settled there, that parties, who have legal ground to complain of the doings of military courts, are to get their remedy by action at law for damages, if they have right to any; (*Ex parte Dunbar*, xiv Mass. R. 393;) which corresponds

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with the view of the Supreme Court of the United States, so far as that goes, in the case of *Wise v. Withers*, 3 Cranch, 330,) where trespass was maintained to recover damages for an act done by a court martial "*clearly without its jurisdiction.*" (See *Wotton v. Gavin*, ii Engl. L. & E. Rep. p. 154.)

The notion suggested by Sir Matthew Hale, and repeated by Sir William Blackstone, (Com. vol. 1, p. 213,) that "martial law is built on no settled principles, but is entirely arbitrary in its decisions, and is, in truth, no law, but something indulged rather than allowed by law,"—is an exploded absurdity. A court martial is a lawful tribunal, existing by the same authority that any other court exists by, and the law military is a branch of law as valid as any other, and it differs from the general law of the land in authority only in this, that it applies to officers and soldiers of the army, but not to other members of the body politic, and that it is limited to breaches of military duty. (See *Grant v. Gould*, ii H. Blacks. 69, 98, 100.)

There is the less room for the superficial remark of Sir Matthew Hale to be applied in the United States, inasmuch as the Constitution expressly empowers Congress "to make (special) rules for the government of the land and naval forces;" (Art. 1 s. 9); and expressly excepts the trial of cases arising in the land or naval service from the ordinary provisions of law. (Amendments, art. 5.)

Accordingly, no doubt is intimated in any of the books of our law as to the competency and completeness of the jurisdiction of courts martial in the cases and under the conditions provided by articles of war. (Serg. on Const. p. 130.) And in the great case of *Moore v. Houston*, (i Wheaton, p. 1,) where a majority of the judges maintained the validity of proceedings by courts martial, established by the States, applicable to the militia, the reasoning of all the judges, on both sides of the question, is conclusive as to the completeness of the jurisdiction of courts martial under the authority of the United States.

In the different States, the constitutionality of the jurisdiction of courts martial has been affirmed, directly or indirectly, beyond all controversy or cavil. (*e. g.* see *Rawson v. Brown*, vi Shepley, 216; *Brent v. Bogardus*, viii Johns. 157.)

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As a general rule, whenever an officer or soldier is charged with any crime whatever, whether it be a violation of the military law only, or also of that and the ordinary law of the land, the military authorities are to proceed to try him. In general, their jurisdiction will prove to be exclusive; for the civil magistrate cannot demand the party, in order to try him for the breach of the common law involved in his act, unless moved so to do by a party injured. In the case of murder, the party injured cannot act. In his behalf, or in that of the society injured in his person, it is the right of any and of every citizen to move the courts of the country to apply the laws of the land to the criminal. But, in ordinary cases, the party injured, if he be himself of the army, either as officer or soldier, will consider that the rights and the interests of the service are injured in the injury done to himself, and will prefer to have the guilty party dealt with by military law, and will not seek to have the civil magistrate interpose. Nay, he may perhaps be lawfully forbidden by his commanding officer to do this. At any rate, the instances will be very rare, in which, as to ordinary acts of violence committed within the ranks of the Army itself, the intervention of the civil magistrate will be possible by the letter or the spirit of the act of Congress. Practically, therefore, it leaves to the military authorities complete and exclusive jurisdiction of all acts of ordinary violence committed within the interior of the Army.

The legislation regarding the Navy differs in some respects, in the matters herein discussed, from that which is enacted as to the Army.

It is not important to consider those differences on this occasion. It will suffice to say, that the general principles apply to both arms of the service; as may be seen by the legal discussions to which the case of Commander Alexander S. Mackenzie gave rise.

In that case, the act of killing an inferior by a superior, which came under inquiry, charged as unlawful homicide, occurred on board a ship of war, at sea; and the questions, pertinent to the present subject, were, whether the act was cognisable exclusively by a naval court martial, or by that concurrently

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with the competent ordinary courts of the United States. The fact of the act having occurred on board a ship of war, and at sea, influenced, materially, the arguments on the question of jurisdiction. For this reason, Ex-Chancellor Kent and Mr. Justice Betts, of the Southern District of New York, both inclined, the former positively, the latter less so, to the opinion that the jurisdiction of the naval authorities was exclusive, more especially as the act of Congress for the government of the Navy does not contain the same recognition of the civil authorities as that for the government of the Army. Whether this view of the law would be acquiesced in, if the act of killing, charged as mutiny by military law, and murder by the civil law, did not occur on the high seas, so as at all events to exclude the jurisdiction of the courts of any State,—whether, for instance, if such an act should occur on board a ship of war lying within the body of any county, the courts of the State might not interpose,—may well be doubted. At the same time, each of those eminent jurisconsults maintained confidently the competency and legality of a naval court martial, at least as having concurrent jurisdiction with the civil courts. And the charge of Mr. Justice Betts is legal authority to the point that, a court martial having lawfully entered upon the cognisance of a case, the civil magistrate cannot lawfully interrupt or disturb its jurisdiction and right of complete and final action.

From the general doctrines of law here stated, sundry corollaries plainly flow, applicable to the present inquiry.

1. It is the duty of General Smith to aid the political authority of the State of Texas in bringing Surgeon Steiner to trial for murder as a citizen on the pending indictment, and to that end to co-operate with any civil magistrates, or, if need be, to act in spite of any particular magistrate, in order to prevent the escape of Steiner.

2. If, in the mean time, Steiner escapes from civil custody, or is released on bail, it is the right and the duty of General Smith to hold him in effective custody until he be remanded for actual imprisonment on mesne process, or for trial by the civil authority of Texas.

3. So long as Steiner is not in the actual custody of the civil

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authorities, he is amenable to the military authorities, and may be tried by them, either for the crime of mutiny, or for that of desertion, or for that of breach of arrest, neither of which is triable by the civil magistrate.

It is merely preposterous for any officer to suppose that, on getting himself arrested by the civil magistrate and put under recognisance, he thus interrupts or determines his general duties as an officer, or shirks his permanent and constant obligations to the military law.

4. Although not necessary in the actual case, yet in deference to the spirit of our institutions and to the civil authority, it may be expedient for the military authorities to suspend the trial of the military relations of the act of killing Brevet Major Arnold, until the civil relations of that act shall have been tried by the civil magistrate.

5. Meantime, the military authorities should take heed that the charges for mutiny be put in due form, and so remain, suspended or adjourned merely, in order that the limitation of time, provided by the Articles of War do not begin to run, and that, however much time be consumed in the civil proceedings, still, at the expiration of them, Surgeon Steiner may be duly tried by a court of his military peers.

6. The trial of Steiner by the civil authorities, whether it result in his acquittal or his conviction, cannot be pleaded in bar on his arraignment before a court martial. The punishment of his crime *civiliter* is no answer to the Articles of War.

7. As it is the duty of General Smith, and will, of course, be his pleasure, to do everything in his power to assist the political authorities in the arrest, custody, trial, and punishment of Steiner, *civiliter*, there can be no collusion or conflict of jurisdiction between the military and the civil authorities, unless the latter shall be found to be acting, under the inspiration of Steiner, so as collusively to defeat instead of promoting the purposes of public justice; or unless the civil authorities, after having had their say in the matter, and in good faith exhausted their own criminal jurisdiction, should undertake to obstruct or impede the military authorities in the exercise of

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their just and appropriate jurisdiction of the case in its military relations.

If, which is not to be anticipated, the civil authorities should attempt any such flagrant violations of law, then it will be the bounden duty of the military authorities, in my opinion, to maintain their jurisdiction, and to yield it only to an order of the President for good cause, or to the ultimate decision of the law by the Supreme Court of the United States.

8. Finally, it is vain, to use no worse term, for Assistant Surgeon Steiner to seek to escape from his military obligations. Every act of attempted evasion, whether by legal contrivances or otherwise, as already intimated, is a dishonorable act, an additional fact of desertion, a new crime, subject to new charges, and to further punishment. His interest and his honor alike dictate that, in the spirit of a true soldier, he frankly and manfully meet the consequences of what he has done. If he is innocent, he will be acquitted. If he is guilty with extenuating circumstances, those circumstances will tell in his favor, both with his brother officers and with the President. If he is guilty, simply and without extenuation, he ought to be content, for the honor of his profession and his country, to die, by the lawful judgment of his peers. In putting on the uniform of his rank, he has voluntarily accepted that double obligation, which distinguishes the soldier from the citizen, and by which he has engaged upon honor, not only to be a good man and a good citizen, but also to be a good officer, as that is defined by military usage in the Articles of War. Those obligations are perpetual and irrevocable; he cannot escape them; he can but suspend their application by violating them afresh, by deserting his standard, by abandoning his country, and by fleeing, from justice, beyond the limits of the United States.

I am, very respectfully,

C. CUSHING.

Hon. JEFFERSON DAVIS,
Secretary of War.

Reprieves.—May's Case.

REPRIEVES.—MAY'S CASE.

The Governor of the Territory of Utah has power to reprieve, but not to pardon, persons indicted and convicted for crime against the United States.

ATTORNEY GENERAL'S OFFICE,

April 14, 1854.

SIR: The letter of Governor Young, of the Territory of Utah, referred to me on the 11th instant, presents the question of the authority by which a pardon may be granted to one William May, convicted of murder in that Territory.

May was sentenced to be executed on the 13th of January, 1854.

Meantime, Governor Young, in the exercise of the powers conferred on him by the act of Congress of September 9th, 1850, (ix Stat. at Large, 453,) granted to May a reprieve until your decision in the premises can be made known.

May might well perhaps have been tried by the laws of Utah; but it appears by a copy of the indictment on file in my office, that he was in fact charged for an act committed "against the statutes, and the peace and dignity of the United States of North America."

The authority given to the Governor, by the act before cited, is to "grant pardons for offences against the laws of said Territory, and reprieves for offences against the laws of the United States, until the decision of the President can be made known thereon."

The present case comes clearly within the latter clause of the provision, and the power of pardon therefore resides in the President.

The action of Governor Young, so far as it has gone, appears to have been lawful and proper; and it only remains for you to consider and decide upon his recommendation of the pardon of May.

I have the honor to be, very respectfully, your obedient servant,

C. CUSHING.

To the PRESIDENT.

International Extradition.

INTERNATIONAL EXTRADITION.

Constructive larceny, consisting of embezzlement of the money of a bank by one of its officers, is not among the causes of extradition provided for by treaty between Great Britain and the United States.

ATTORNEY GENERAL'S OFFICE,

April 21, 1854.

SIR: Your letter of the 19th, referring a case of demand of extradition, would have received my attention immediately, but for my having been out of town for the last three or four days.

It communicates an application from James M. Ray, of the State of Indiana, for a requisition on the British government to deliver up one Hamilton, charged as a fugitive from the justice of that State; and submits the question: "Whether the evidence here adduced is sufficient to justify the Department in making the desired requisition?"

No evidence is adduced except an affidavit, made by Mr. Ray himself, before a notary public, that, at a certain time, Hamilton "feloniously stole from the State Bank of Indiana fourteen hundred and fifteen dollars in bank notes of the State Bank," and so forth, and that Hamilton had probably fled into the British provinces.

If this application depended on the question submitted, it would not be in my power to say that the evidence is sufficient, because it ought to have been passed upon by an examining and committing magistrate, before being submitted to the President.

That defect in the papers filed might be cured; but there exists in the case another difficulty, which seems to be insuperable.

The only crimes for which extradition is provided in any treaty between the United States and Great Britain are "murder or forgery" by the treaty of 1794, (viii Stat. at Large, p. 129,) and "murder, or assault with intent to commit murder, or piracy, or arson, or robbery or forgery, or the utterance of forged papers," by the treaty of 1842. (viii Stat. at Large, p. 576.)

The crime, imputed to Hamilton by the affidavit of Mr. Ray, is larceny, and that is not within the treaties.

Certificate of Government Titles.

It is the established rule of the United States, neither to grant, nor to ask for, extradition of criminals, as between us and any foreign government, unless in cases for which stipulation is made by express convention. I cannot, therefore, advise that, in the present case, the desired requisition be made on the British government.

I am, very respectfully,

C. CUSHING.

Hon. WM. L. MARCY,
Secretary of State.

CERTIFICATE OF GOVERNMENT TITLES.

The Attorney General, in certifying the title of land purchased by the Government, must look at the question as one of pure law, and cannot relax the rules of law on account either of the desirableness of the object or the smallness of the value of the land.

ATTORNEY GENERAL'S OFFICE,

April 27, 1854.

SIR: In compliance with your request of the 25th instant, I have examined the new papers as to the proposed site of three beacon lights in the river Hudson.

Those papers confirm the conclusion to which I arrived on examining the title papers, namely: That the tenants under whom a conveyance to the United States is proposed, hold by possession only, and that for aught that appears to the contrary, they are subject to be evicted at any time at the suit of the State of New York. In such a state of facts, it is impossible for me to certify that their deeds will convey a valid title to the United States.

The fact of the small cost of a proposed purchase, or that it may not be permanently needed by reason of the structures contemplated being moveable, or that the object is a very desirable one, is wholly immaterial to the question of the validity of the title, and cannot of course affect my judgment on that point. The validity of a title is a mere question of law, not of expediency. All we are permitted to do in that relation, is to

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pursue the statute, which provides that "no public money shall be expended upon any site or land hereafter to be purchased by the United States" for particular purposes, unless "the validity of the title" be first ascertained by prescribed legal means, that is, the opinion of the Attorney General.

Congress may undoubtedly relax the law in this case, and authorize the Department to purchase the proposed sites, and expend money upon them; but it seems to me premature to do this, until inquiry be had as to the previous history of the land, with a view to ascertain against whom it is that the possession has been usurped by the tenants; and if the State of New York has a dormant interest, it would be respectful to that State, and an easy course, to obtain a relinquishment from her to the United States.

I am, very respectfully,

C. CUSHING.

P. G. WASHINGTON, Esq.,

Acting Secretary of the Treasury.

CLERKS OF COURTS IN CALIFORNIA.

The clerks of the district courts of the United States in California are bound to render to the Treasury an emolument account equally with clerks of other districts.

ATTORNEY GENERAL'S OFFICE,

May 1, 1854.

SIR: By your communication of the 7th ult., my opinion is requested,—as to whether, in view of the provisions of the acts of 28th Sept., 1850, (Statutes at Large, vol. 9, p. 521,) and 26th February, 1853, (Acts of 2d Ses. 32d Cong., p. 169,) the clerks of the United States courts of the State of California are, or are not, required to render the emolument accounts semi-annually, like clerks of those courts in the other States, in accordance with the 167th paragraph of the act of 18th May, 1842, (Stat. at Large, vol. v, p. 483.)

The question stated comprises distinct periods of time; the first, from said 28th September, 1850, when the laws and judi-
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cial system of the United States were extended to the State of California, to 26th February, 1853, when the act passed "to regulate the fees and costs to be allowed clerks, marshals, and attorneys of the Circuit and District Courts of the United States, and for other purposes;"—the second, from and after the passage of the said act of 26th February, 1853.

During the first period, the fees and costs to be allowed to attorneys, marshals, and clerks of the United States were not uniform throughout the United States, but regulated in some services by the specific rates of fees enacted by Congress, and, as to other services, by reference of Congress to the laws of the several States, for the rates of fees allowed by the laws of the States, respectively, for similar services.

The act of 1842, in paragraph 167, provided "That every district attorney, clerk of a district court, clerk of a circuit court, and marshal of the United States, shall, until otherwise directed by law, upon the first days of January and July in each year * * * or within thirty days from and after the days specified, make to the Secretary of the Treasury, in such form as he shall prescribe, a return in writing, embracing all the fees and emoluments of their respective officers, of every name and character; * * * and no clerk of a district court * * * shall be allowed by the said Secretary to retain of the fees and emoluments of his said office * * * for his own personal compensation, over and above the necessary expenses of his office, and necessary clerk-hire included, also to be audited and allowed by the proper accounting officers of the Treasury, a sum exceeding three thousand five hundred dollars for any such district clerk * * * or at or after that rate for such time as he shall hold the office, * * * and every such officer shall, with each return made by him, pay into the public treasury of the United States, or deposit to the credit of the Treasurer thereof, as he may be directed by the Secretary of the Treasury, any surplus of the fees and emoluments of his office, which his half-yearly return so made as aforesaid shall show to exist over and above the compensation and allowances hereinbefore authorized to be retained and paid by him. * * * And provided further, that the district attorney, marshal, clerk of the Circuit

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Court, and clerk of the District Court of the United States for the northern and southern districts of New York, shall not hereafter receive any greater or other fees and emoluments * * * than now are, or hereafter may be, allowed by the laws of the State of New York, to attorneys, solicitors, counsel, sheriffs, and clerks in the highest courts of law or equity, of original jurisdiction, of the State of New York, according to the nature of the proceedings, for like services rendered therein."

This law, contained in said paragraph, No. 167, requiring accounts to be rendered, was not a local law, but general, extending throughout all the several states of the Union.

Under this law, the offices of the clerks of the district courts and circuit courts of the United States are public establishments, *pro bono publico*; the fees thence arising are public property, appropriated first to defray the expenses and charges of the respective establishments, including the compensations to the principal clerks and their subordinates at the respective offices; the surplus, if any, to be applied to the general charges upon the public treasury.

It is palpable under this law, that a district court's clerk's office is not of the private estate, or individual property of the clerk, nor are the fees or emoluments of the office to be regarded as of the private estate or property of the clerk. He is but the officer, the receiver, the trustee for the United States, to receive out of the fees and emoluments a personal compensation for his services and superintendence, at a rate not exceeding three thousand five hundred dollars per year, during his continuance in office.

Such was the law when by the said act of 28th September, 1850, (Vol. ix, p. 52,) "All the laws of the United States which are not locally inapplicable, shall have the same force and effect within the said State of California, as elsewhere within the United States."

The 2d section of the said act established two judicial districts, the northern and the southern, and two district Courts of the United States in the State of California, with the powers, which were by law given to the judge of the southern district of New York,—each judge to appoint a clerk at the

place at which a court is holden within the district, who "shall receive for the services they may perform for the first four years after the passage of this act, double the amount allowed to the clerk of the southern district of New York, and thereafter shall receive only the fees allowed to the clerk of the said southern district of New York, and may appoint a deputy."

By this act the paragraph 167 of the act of 1842 was extended over the State of California, along with all the other general laws of the United States. The clerk of the southern district of New York was comprehended in the regulations of said paragraph 167, and he was bound to render his accounts of fees and emoluments, and pay the surplus into the Treasury of the United States, according to the provisions of the said paragraph 167 of the act of 1842.

The act of 28th September, 1850, allowed the clerks of the District Courts of the United States in the northern and southern districts of California, respectively, to demand double the fees, and to receive for their personal services double the compensation, allowed to the clerk of the southern district of New York, that is, a compensation at the rate of seven thousand dollars per annum to the California clerk, instead of at the rate of three thousand five hundred dollars per annum allowed by law as the maximum of compensation to the clerks of the courts of New York.

There is no inconsistency, no repugnance, between the paragraph 167 of the act of 1842, and the act of 28th September, 1850, whereby the latter is to work, by implication, a repeal of the former act.

"It is not sufficient to establish that subsequent laws cover some or even all of the cases provided for by a former law, for they may be merely affirmative or auxiliary. But there must be a positive repugnancy between the provisions of the new and those of the old law; and even then, the old law is repealed by implication only *pro tanto*, to the extent of the repugnancy." (Wood v. United States, xvi Peters, 362, 363; Daviess v. Fairbairn, iii Howard, 646; Beales v. Hale, iv Howard, 53.)

I cannot perceive anything in the said act of 28th September, 1850, which repeals the paragraph 167 of the act of 1842,

and transforms the officers of the clerks of the District Courts of the northern and southern judicial districts of the United States in California from public establishments, into the private estates and property of the persons appointed respectively to those clerkships.

The act of 26th February, 1853, in section 1st, enacts a table of fees, for district and circuit courts, attorneys, solicitors and proctors, marshals and clerks, which is uniform throughout the several States.

Sect. 3d re-enacts substantially, but with some modifications, the two first provisions of the paragraph 167 of the act of 18th May, 1842;—the Secretary of the Interior is substituted in place of the Secretary of the Treasury;—the maximum of the compensation for clerks of circuit courts, instead of \$2500 per year, as by the old law, is raised to \$3500 per year, equal to that of the district court clerk;—a clause is introduced, “That when the compensation of any clerk shall be less than five hundred dollars per annum, the difference, ascertained and allowed by the proper accounting officer of the Treasury, shall be paid to him therefrom;”—and with respect to the attendance of the district attorney, clerk of a district or circuit court, or marshal or deputy marshal, upon a district or circuit court while setting for the transaction of business under the bankrupt law merely, the paragraph 167 is altered by omitting the words “unless such district attorney, clerk, or marshal shall be required by the judge of said court, or the Solicitor of the Treasury to attend the session of the same, shall actually attend for the performance of the duties of his said office,” thereby making such *prohibition*, which by the old law was conditional and qualified, now unconditional and peremptory. And the 3d section of the act of 1853 expressly provides, “That the two last provisoes of paragraph 167 * * * of the act approved May 18th, 1842, which require clerks to certify accounts, and confine the marshals, clerks, and district attorneys of the northern and southern districts of New York, to the fees allowed by the State law to clerks, attorneys, counsellors and sheriffs for similar services in the State courts, are hereby repealed.” (P. 167.)

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The same act also contains the following provisions :

"No district attorney, marshal, or clerk, or their deputies, shall receive any other or greater compensation for any services rendered by him than is provided in this act, and all acts and parts of acts allowing to either of them any other or greater fees than is herein provided, are hereby repealed; and to receive any other or greater compensation is hereby declared a misdemeanor. * * * * * But this act shall not be construed to prohibit the payment of any salary authorized by statute: Provided, that in the State of California and the Territory of Oregon, officers, jurors, and witnesses shall be allowed for the term of two years, double the fees and compensation, allowed by this act, and the same fees allowed by this act with fifty per cent. added thereto, for two years thereafter."

In thus making exception of certain things in California, the act certainly intends that other things are not excepted from its provisions.

The general purview of the act of 1853, its re-enactment of the provisions of the former law in paragraph 167 of 1842, with the alterations as to the future, making them more stringent, and leaving in force the provisions of that paragraph except the two last provisoes, certainly comprehend the clerkships in California; and but for the proviso as to them, they would have been limited to the ultimatum of three thousand five hundred dollars per annum for their compensation. That proviso allows them double compensation, that is, at the rate of seven thousand dollars per year, and also allows them to demand and receive double the fees established by that act, in order to produce the funds for paying that double compensation and all the other costs, charges, and expenses of office. But that proviso does not release them from the command and duty to render the accounts of fees and emoluments received, and their obligation to pay the surplus into the public treasury, as required by the general purview of the section upon which the proviso is engrafted as a qualification, but as a qualification to the extent, and no more than to the extent, expressed in the proviso.

There is nothing, it seems to me, in the act of 1853, to countenance the idea that the clerks of the District Courts of

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the United States for the northern and southern districts in the State of California, are absolved from the duty of rendering account of fees and emoluments, and of paying over the surplus to the Treasury of the United States. It would be an overstrained and irrational construction of the proviso allowing double fees and double compensation, to say that it had transmuted those public establishments in California into the private estates of the clerks respectively, and that they were to demand and have the double fees, each to his own private use and benefit, free from any accountability for the surplus above the necessary charges and expenses of the office, including clerk hire and the compensation at the rate of seven thousand dollars per year to the clerk appointed by the court and holding the office.

The proviso, which allows double fees and double compensation, is not repugnant to the purview, which requires the clerk to give an account and pay the surplus into the public Treasury. The purview and the proviso may well stand together and each have the intended effect.

The clause which provides "That when the compensation of any clerk shall be less than five hundred dollars per annum, the difference, ascertained and allowed by the proper accounting officer of the Treasury, shall be paid to him therefrom," (p. 166,) repels the idea that a clerkship is the private estate of the person who holds the office as clerk appointed by the court. It shows that Congress consider the clerkship as a public establishment for the public benefit, and, as such, to be supported from the public Treasury, if the fees and emoluments specially appropriated for that purpose will not yield a sufficient fund to pay the expenses of the establishment and a reasonable compensation to the clerk. All just men will agree that a public officer ought to receive from the public funds a reasonable compensation for his public services in the office. But it is not the proper business of Government to supply the deficiencies in the annual products of private estates by contributions from the public Treasury.

Upon the whole, my opinion is, that the clerks of the District Courts of the United States for the northern and southern districts in the State of California, are bound to render their

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accounts of fees and emoluments, and after retaining a personal compensation at the rate of \$7000 per annum, and all just expenses, including clerk hire, are bound to pay over the surplus to the credit of the Treasurer of the United States; but, in taking such accounts, from the date of the act of 28th September to 26th February, 1853, the adjustment should be ruled by the 167th paragraph of the said act of 18th May, 1842, and as to accounts of fees and emoluments accruing after the passage of the said act of 26th February, 1853, they are to be ruled and adjusted by the said act of 1853, which has modified in part and also repealed in part the said paragraph 167 of the act of 1842, as will be seen by comparing the third section of the said act of 1853 with the said paragraph 167 of the act of 1842.

I have the honor to be, very respectfully,

C. CUSHING.

Hon. R. McCLELLAND,
Secretary of the Interior.

MIAMI INDIANS.

Acts of Congress, directing the payment of annuity money to individuals of the Miami Indians residing in the State of Indiana, are not in contravention of treaty stipulations between the United States and the Miami Indians.

ATTORNEY GENERAL'S OFFICE,
May 4, 1854.

SIR: I have considered the subject presented in the letter of the Commissioner of Indian Affairs, communicated to me by your letter of the 11th of February.

By the treaty of 23d October, 1826, (Stat. at Large, vol. vii, p. 301,) the United States engaged to pay those Indians an annuity of \$25,000 "as long as they existed together as a tribe."

In the treaty of 6th November, 1838, (same vol. 570-571,) concluded at the forks of the Wabash, in the State of Indiana, it is agreed that certain moneys, goods, and annuities, are to be paid to the Miami tribe of Indians; and by Art. 14, "Whereas,

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John B. Richardville, the principal chief of said tribe, is very old, infirm, and not well able to endure the fatigue of a long journey, it is agreed that the United States will pay to him and his family the proportion of the annuity of said tribe which their number shall indicate to be due to them, at Fort Wayne, whenever the said tribe shall emigrate to the country to be assigned them, west, as a future residence."

By Article xii., and schedule referred to, "The United States agree to grant, by patent, to each of the Miami Indians named in the schedule hereunto annexed, the tracts of land therein respectively designated." The schedule specifies several tracts to the said chief, J. B. Richardville, and tracts to various other Indians named; among whom are Francis Godfroy, a chief; in all to the number of thirty-five Indians, or heads of families.

By the treaty concluded at the forks of the Wabash, in the State of Indiana, on the 28th of November, 1840, (vol. vii, p. 583,) the Miami Indians made another cession of lands to the United States, being all their remaining lands in Indiana, lying on the south side of the Wabash, "the residue of the Big Reserve," for the sum of \$550,000, to be paid some to individual Indians, and the residue to the tribe, in the manner stipulated in the several articles of the treaty; and the tribe agreed to remove in five years to the country assigned them, west of the Mississippi.

Art. v. "That the United States shall pay to the family of said deceased chief Francis Godfroy, their just proportion of the annuities of said tribe at Fort Wayne, from and after the time the tribe shall emigrate to the country assigned to them, west of the Mississippi."

Art. vii. stipulates, "That the United States convey by patent to Me-shing-go-me-sia, son of Ma-to-sin-ia, the tract of land reserved by second article of the treaty of 6th November, 1838, to the band of Matosinia, to be held in trust by said Me-shing-go-me-sia, for his bond," &c. "And the same provision made in favor of John B. Richardville and family, in the 14th article of that treaty of November 6th, 1838, is hereby granted and extended to the above-named Me-shing-go-me-sia, and to his brothers."

Miami Indians.

By Art. xi., nothing in this treaty is to be construed to impair the force or validity of pre-existing treaties between the contracting parties.

By a joint resolution of 3d March, 1845, (vol. vi, p. 942,) "The portions or shares of annuities or other moneys which are now, or may hereafter become, payable to the Miami tribe of Indians due to the following named persons members of the said tribe of Indians, shall be hereafter and for ever payable to them and their descendants at Fort Wayne, or Peru, or such other place, in the State of Indiana, as the Secretary of War shall direct, viz., (here follow the names of twenty-one Indians.)

"That if the aforesaid Indians, their descendants, or any part thereof, shall hereafter remove to the country west of the Mississippi river, assigned to the Miami tribe of Indians, then, and in each case, the portions or shares of annuities or other moneys payable to said tribe shall be paid to such persons so removing, at the place of payment of annuities to said tribe of Indians."

By a joint resolution of 1st May, 1850, (ix Stat. at Large, p. 806,) "The provisions of the above-mentioned joint resolution," (approved 3d March, 1845,) "be, and the same are hereby extended to the following persons and their families and descendants, to wit," (here follow the names of twelve Indians,) who are all residents of the State of Indiana."

Payments have been made at Fort Wayne and Peru to these individual Miami Indians, or families not residing with their tribe west of the Mississippi river; of which payments, it appears, the principal chief of the emigrated Miamis complains, alleging that all the annuity money should be paid to the tribe as a tribe, and that any money, paid to these particular individuals, is, as he pretends, improperly withheld from the tribe. And the question is, whether the resolutions of Congress, directing the payments to certain of the Miami Indians residing within the State of Indiana, are in contravention of the treaty stipulations."

In the treaties of 1838 and 1840, the intent is manifested, that those of the Miami Indians, who did not remove to the new habitation assigned to the tribe, should nevertheless receive their shares and proportions of the moneys and annuities engaged to

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the tribe. The resolutions of Congress of 1845 and 1850, did nothing more than carry out the intent and spirit of the treaties.

These Indians are dependants, wards, and pupils, under the guardianship and protection of the Government of the United States. (*Cherokee Nation v. State of Georgia*, i Peters, 17.) The resolutions of 1845 and 1850 have ordered a distribution, as to the Indians residing in Indiana, *per capita*, or by families, in proportion of their numbers to those of the tribe residing west of the river Mississippi; to which non-residence, the Miami tribe were consenting by the treaties of 1838 and 1840, and are consenting.

To exclude an erroneous conclusion, which seems to be implied in the mode, form, and occasion of the question submitted, it is proper to observe, that some treaties execute themselves, and require no legislation by Congress, no appropriation of money to carry them into effect; as in the case of treaties which confirm a right, bar a right, cede territory, extinguish a right, or give a right to a specific thing; so that as soon as the treaty is duly ratified, it is executed. Other treaties, such, for instance, as require appropriations of money to carry them into effect, are executory.

"No money shall be drawn from the Treasury but in consequence of appropriations made by law," says the Constitution; and all the executive officers of the Government are bound to conform to the directions, modes, and objects of appropriations declared by the acts of Congress which make the appropriations.

If acts of Congress are dubious, admitting of two or more constructions, undoubtedly the construction should be adopted which does not conflict with a treaty, nor overthrow fundamental principles. (*United States v. Fisher and others*, ii Cranch, p. 390.)

But where there is no ambiguity in the words of a statute, there is no room for construction. (*United States v. Wiltberger, v. Wheaton*, p. 95-96; *United States v. Morris*, xiv Peters, p. 475.)

The resolutions of 3d March, 1845, and 1st May, 1850, are too plain to admit of construction, too explicit and irresistibly

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clear, to be disregarded upon the supposition that they conflict with a treaty, made with the tribe of the Miami Indians.

The political action of Congress, in directing how the annuities to the Miami Indians shall be distributed, ought, in my opinion, to continue to be obeyed by the Department.

I am, very respectfully,

C. CUSHING.

Hon. ROBERT McCLELLAND,
Secretary of the Interior.

RESERVATION FOR PRESIDENT'S MANSION.

The original reservation in the plat of the city of Washington for the President's Mansion, extended south to the bank of the stream called Goose Creek.

There is no public street lawfully existing across that reservation south of the President's Mansion.

ATTORNEY GENERAL'S OFFICE,
May 4, 1854.

SIR: My opinion is required upon the subject of the passway from the intersection of Pennsylvania Avenue with Fifteenth Street, thence around the southern front of the President's mansion in the city of Washington, to Seventeenth Street; and whether that passway may be obstructed, and united and enclosed with other public grounds south of the President's House?

By the act of Congress passed 16th of July, 1790, entitled "An act for establishing the temporary and permanent seat of the government of the United States," (i Stat. at Large, p. 130, chap. 28,) the President was authorized to select, and cause to be laid out and surveyed, by proper metes and bounds, a district of country, on the river Potomac, within the limits therein described, not exceeding ten miles square, "for the permanent seat of the government of the United States," with power to appoint three commissioners, "who, or any two of whom, shall, under the direction of the President, survey, and by proper metes and bounds, define and limit" the district. And it was further provided that "the said commissioners, or any two of

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them, shall have power to purchase, or accept, such quantity of land on the eastern side of said river, within the said district, as the President shall deem proper, for the use of the United States, and according to such plans as the President shall approve; the said commissioners, or any two of them, shall, prior to the first Monday in December, in the year 1800, provide suitable buildings for the accommodation of Congress, and of and for the public offices of the government of the United States.

"Sec. 4. That, for defraying the expense of such purchases and buildings, the President of the United States be authorized and requested to accept grants of money."

On 30th March, 1791, the President of the United States, by his proclamation, declared and made known that he had selected for the permanent seat of government, the ten miles square described therein, and since known, first as the "Territory of Columbia," and now as the "District of Columbia." (Davis's Collection of the Laws of the District of Columbia, p. 58.)

Presently, thereafter, Notley Young, Daniel Carroll, of Duddington, and various others, proprietors of the lands on the eastern side of the Potomac, and within the said district, conveyed their lands to Thomas Beall and John Mackall Garret, in trust, to be laid out "for a Federal City, with such streets, squares, parcels, and lots, as the President of the United States, for the time being, shall approve," and in trust to convey, according to the said act of Congress of 16th July, 1790, "to the use of the United States for ever, all the said streets, and such of the said squares, parcels, and lots, as the President shall deem proper for the use of the United States, and that as to the residue of said lots, * * * * a fair and equal division shall be made," between the United States and the individual proprietors, respectively, in the manner declared in the deed of trust. The lots in the division to be assigned to the United States, shall be sold "at such time or times, in such manner, and on such terms and conditions, as the President of the United States shall direct," the proceeds of sale to be applied, first to the payment of the proprietors of the squares, parcels,

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and lots reserved and appropriated to the use of the United States, "at the rate of twenty-five pounds per acre, not accounting the said streets as part thereof," and the residue and surplus of the proceeds of sales to be turned over to the President of the United States "as a grant of money, and to be applied for the purposes and according to the act of Congress aforesaid:"—the lots and land not appropriated to the use of the United States, nor allotted for sale for the purposes aforesaid, to be reconveyed to the respective proprietors thereof who conveyed to the trustees, Beall and Garrett.

Under the deed of trust, and in pursuance of the aforementioned act of Congress of 16th July, 1790, the commissioners appointed proceeded by the direction, and with the approbation, of President Washington, to survey and lay out the City of Washington. The form of the deed of trust and its terms at large, are to be seen in the collection, respecting the District of Columbia, of laws, &c., published by William A. Davis, p. 60.

By act of the legislature of Maryland, passed 19th December, 1791, entitled "An act concerning the Territory of Columbia and the City of Washington, (Kelty's ed. Laws Maryland, vol. ii., chap. xiv., Davis' Collect. p. 64,) the President's proclamation of 30th March, 1791, made "by virtue of several acts of Congress, and acts of the Assemblies of Virginia and Maryland,"—the deed of trust by Young, Carroll, and others, and the terms thereof,—the laying out of the City under the direction of the President of the United States; thereupon Maryland ceded to the United States her portion of this Territory of Columbia,—are severally recited, and all the lands within the City of Washington, are subjected to the terms of the deed of trust aforesaid, made by Carroll, Young, and others, to Beall and Garrett, whether belonging to minors, persons absent from the state, married women, or persons *non compos mentis*:—it being, says the act, "highly just and expedient that all the lands within the said city should contribute their due proportion in the means which have already very greatly enhanced the value of the whole: that an incontrovertible title ought to be made to the purchasers, under public auction," &c.,

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&c. Therefore, the said act adopts, approves, and confirms all the provisions of said deed of trust, as to all the lands within the city of Washington; and makes various regulations on the subject.

The plan of the city of Washington, as laid out by the commissioners, pursuant to the act of Congress of 16th July, 1790, and under the superintendence and approval of President Washington, and the record of the reservations and division, have been carefully preserved in the archives of the Capitol, under the care of the Commissioners of the Public Buildings. That plat, or plan, indicates the streets and avenues dividing the ground into squares, parcels, and lots. The plat or plan, and the record of the divisions, also show those selected by the President of the United States for the public use of the Government, to be paid for at twenty-five pounds per acre,—those allotted to the Government for sale, to pay, first, the said price of twenty-five pounds per acre, and the surplus, as a grant of money to the United States;—and those allotted, in the partition, to the respective individual proprietors of the lands so surveyed into streets, avenues, squares, parcels, and lots, to be conveyed, according to the terms of the deed of trust, to the individual proprietors, who had so contributed to the purposes of the city and the uses of the Government.

It appears, by the report of the Commissioner of the Public Buildings, that, on the original plan and plat of the town, in manuscript, there is no street south of the buildings for the mansion of the President, such as the present question supposes. An engraved map and plan of the city, published in Philadelphia in 1792, by Thackara and Vallance, and another, engraved and published in Boston by Samuel Hill, appear, upon inspection, to give no such street south of the President's Mansion. All the evidence attainable tends to prove that there was no such circular street south; that the ground south of the President's Mansion was not interrupted by any street, avenue, or highway whatever; but the block, and reservation for the President's buildings, extended south, between Fifteenth and Seventeenth Streets, without interruption, down to the bank of what was then Goose Creek, now the Tiber.

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Such being the fact, as to the original plan and plat, and reservation of this parcel to the use of the United States, no authority, save that derived from the Congress of the United States, could open a street through this public parcel, or block of ground, reserved to the use of the United States.

Congress has conferred no such authority upon the President of the United States; nor upon the corporate authorities of the city; nor upon the Board of Commissioners or Levy Court of Washington, in the District of Columbia; nor upon the original Commissioners; nor upon the Commissioner of the Public Buildings; nor upon any officer or individual whatever, so far as I am able to discover by diligent inquiry and examination.

According to the 1st section of the act of 12th January, 1809, (Stat. at Large, vol. ii, p. 511; Davis' Collection, p. 189,) "Whenever the *proprietor* of any square or lot, in the City of Washington, shall deem it necessary to subdivide such square or lot into convenient building lots, pieces, or portions, for sale and occupancy, and alleys for their accommodation, he may cause a plat of the same to be made, on which shall be expressed the dimensions and length of all the lines of such portions as are necessary for defining and laying out the same on the ground, and may certify such division under his hand and seal, in the presence of two or more credible witnesses, upon the same plat, or on a paper of parchment attached thereto."

Section 2d authorizes the surveyor of the city to examine whether the dimensions and lines agree with the dimensions of the whole of the square, and whether the dimensions expressed, for the subdivisions, be the true dimensions of the parts so expressed, and if he find the plat correct, "he shall certify the same under his hand and seal, with such remarks as appear to him necessary for further illustration thereof, and record the said plat, as examined, in a book or books, to be kept by him for that purpose."

By section 3d, "When such subdivision shall be so certified, examined, and recorded, the purchaser, of any part thereof, or any person interested therein, may refer to said plat and record for description, in the same manner as to squares and lots

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divided between the commissioners and original proprietors, and the ways, alleys, or passages, laid out or expressed on such plat of subdivision, shall be and remain to the public, or subject to the uses declared," &c.

By section 7, "All records of the division of squares and lots heretofore made between the public and original proprietors, or which are authorized by this act, shall be kept in the office of the surveyor of the city; and all transcripts therefrom, certified by him, shall be evidence."

"Sec. 8. Whenever the President of the United States shall deem it necessary to subdivide any square, belonging to the United States, within the city of Washington, *which may not have been reserved for public purposes*, into convenient building lots, pieces, or portions, for sale and occupancy, and alleys for their accommodation, he may cause a plat to be made by the surveyor of the city, in the manner prescribed in the first section of this act, which plat shall be recorded by said surveyor, and the provisions of this act shall extend to the lots, pieces, and parcels of ground, contained in such plat, as fully as to subdivisions made by individual proprietors."

The authority given by this act to the President of the United States is confined to those squares, parcels, and lots, which, in the division, were allotted to the United States for *sale*, under the direction of the President, to raise money, first, to pay for the public reservations at the rate of twenty-five pounds per acre; and secondly, as a grant of money to the United States for the purposes mentioned in the 4th section of the said act of Congress of 16th July, 1790. It confers no authority to subdivide into building lots and alleys, the squares, parcels, and lots taken, selected, and reserved for the use of the United States, nor to make any new street, avenues, highway, or alley, through such reservation, for public use.

The act of 1st July, 1812, (ii Stat. at Large, p. 771, ch. 117,) investing the Board of Commissioners with "full powers to lay out, straighten, and repair public roads within the said county of Washington," specially excepted "the grounds within the limits of the city of Washington and Georgetown."

The act of 24th February, 1817, (iii Stat. at Large, p. 346, Vol. VI.—29

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ch. 18,) authorized the President to subdivide part of reservation number ten, on the north side Pennsylvania Avenue, between Third and Four-and-a-half streets, into building lots, and to sell a part of the lots.

The 15th section of the act of 15th May, 1820, (iii Stat. at Large, p. 583,) does not confer any power upon the Commissioner of the Public Buildings, or any other person, to make any new street, avenue, alley, or highway, through any of the grounds reserved for the public use of the United States. The power there given is, to pay for improving streets and avenues, setting curbstones, and paving of footways.

The act of 20th May, 1826, (iv Stat. at Large, p. 186, ch. xxx,) extended the power of the Commissioner of Public Buildings, under the 15th section of the said act of 15th May, 1820, "as well to public open spaces, as to public squares or reservations;" that is, they may be improved, curbstones set, and footways paved around them, but not cut through by a new street, avenue, alley, or highway.

By the 12th section of the act of May 17th, 1848, (ix Stat. at Large, p. 228, 229, ch. 42,) it is enacted that "The Commissioner of Public Buildings, or other officer having charge and authority over the lands and property of the United States, lying within the city of Washington, shall, from time to time, cause to be opened and improved such avenues and streets, or parts or portions thereof, as the President of the United States, upon application of the corporation of the said city, shall deem necessary for the public convenience, and direct to be done; and he shall defray the expenses thereof out of any money arising, or which shall have arisen, from the sale of lots in the city, belonging, or which may have belonged, to the United States, and from no other fund."

The powers of the corporation of the city of Washington, in relation to the streets and avenues, are to be seen in the following acts of Congress.

1. "An act to incorporate the inhabitants of the city of Washington in the District of Columbia," approved 3d May, 1802. (ii Stat. at Large, p. 197, ch. 53, sec. 6.)

2. "An act further to amend the charter of the city of

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Washington," approved 4th May, 1812. (ii Stat. at Large, p. 725, 726, ch. 75, sec. 5, 6.)

3. "An act to incorporate the inhabitants of the city of Washington, and to repeal all acts heretofore passed for that purpose," approved 15th May, 1820. (iii Stat. at Large, p. 587, 588, ch. 104, sections 7 and 8.)

The nature and the extent of the power, conferred on the corporation by these acts, may be seen by that of 1820, which enacts, that the said corporation shall have full power and authority "To open and keep in repair streets, avenues, lanes, alleys, drains, and sewers, agreeably to the plan of the city," and "To cause new alleys to be opened through the squares, and to extend those already laid out, upon the application of the owners of more than one-half of the property in such squares."

These provisions comprehend all the authority, pertinent to the question, which is vested in the corporation; and do not confer on it any control over this reservation.

4. "An act to authorize and empower the corporation of the city of Washington, in the District of Columbia, to drain the low grounds on and near the public reservation, and to improve and ornament certain parts of such reservation," approved 7th May, 1822. (iii Stat. at Large, p. 691, ch. 96.)

This act relates to reservations number ten and eleven, and twelve, and authorizes the corporation to lay them off into building lots, and sell them to aid in draining said low grounds. This, of course, has no bearing upon the question in hand, as to a circular highway through the public reservation number one.

5. "An act vesting in the corporation of the city of Washington, all the rights of the Washington Canal Company, and for other purposes," passed 31st May, 1832. (iv Stat. at Large, p. 524, ch. 113, sec. 8, 10.)

This act made a donation, to the corporate authorities of the city of Washington, of certain parts of the reservation called "The Mall," between Sixth and Fifteenth streets West, south of Canal street, and of the reservation on the south side of the Mall; also between said Sixth and Fifteenth streets,—as laid

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down in a map and plan thereof, by F. C. DeCraft,—into streets and avenues, and squares, which plat or map is, by section 11, ordered to be recorded in the Surveyor's office for the city, and in the office of the Commissioner of Public Buildings, "as indicating correctly the said lands and squares, streets and avenues:"—which by section 10, "shall in like manner be opened and kept open," as the other streets and avenues in said city.

This act did not touch the reservation number one, which is the subject of inquiry.

Moreover, by act of 2d March, 1833, (iv Stat. at Large, p. 651, ch. 73,) the United States gave the city \$150,000, in lieu of the said lands, and the corporation relinquished all their "rights and privileges under the said 8th, 10th, 11th, 12th, 13th, and 14th sections of said act of 31st May, 1832."

6. "An act to continue, alter, and amend the charter of the city of Washington," passed May 17th, 1848. (ix Stat. at Large, p. 224, ch. 42, sec. 2.) By this the corporation shall have power to "cause *new alleys* to be opened into the squares, and to open, change, or close those already laid out, upon the application of the owners of more than one-half the property in such squares, subject to the second proviso of the eighth section of the act of May 15th, 1820," requiring "that the damages which may accrue thereby to any individual or individuals, shall be first ascertained by a jury, * * * * the amount and expenses thereof shall be levied, in due proportions, upon the individuals whose property on each squares shall be benefited thereby."

This relates to private property only, and does not confer any power to open new alleys through the grounds reserved for the use of the United States.

On the whole, an examination of the acts of Maryland, and, the acts of Congress, relative to the city of Washington, leads to the following conclusions, namely:

1. The plan of the city of Washington was made by commissioners, appointed by President Washington, and under his direction and superintendence.

2. When the city was so laid out into parcels, squares, lots, and divisions, by streets, avenues, and alleys, according to the

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plan so adopted, and a plat thereof had been made, President Washington first selected and reserved, to the public use of the United States, various of those parcels and squares, for the Capitol, the President's House, the Navy Yard, public buildings, and public establishments within the city, to be paid for, to the original proprietors of the lands, at the rate of twenty-five pounds per acre.

3. All these reservations, and the streets and avenues, were vested in the United States.

4. The residue of the squares, lots, and parcels were divided equally between the United States and the proprietors of the said lands included within the limits of the city;—those so allotted to the United States, in this division, were for sale, under the direction of the President of the United States as to the times and terms of sale;—the proceeds of these sales were pledged for the payment of said price of £25 per acre of the public reservations, to those who, respectively, had owned them when selected, and reserved and taken to the use of the United States, the surplus of such sales to belong to the United States as a grant of money by those former proprietors;—the parcels, lots, and squares, so allotted in the division to the individuals, to be returned to them as their private estates, within the city, subject to the rules, and laws and regulations, for the government of the city of Washington.

5. New streets or avenues, in the city, could not be made but by the Government of the United States, having exclusive legislation over the District, or by an authority delegated by the United States.

6. In all the legislation of Congress upon the subject of new subdivisions of the squares and blocks in the city, it has carefully provided that they shall be surveyed by the city surveyor, recorded in his office, and likewise in the office of the Commissioner of the Public Buildings, and made matters of public record certain and accessible to all: not depending on conjecture, or oral proof, but to be proved by the record.

It is clear that there is no record of any new street to run through, cut off, and divide the public reservation number one,

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which, in the original plan and map of the city, was one entire parcel, reserved for the President's Mansion.

It may be inquired, however, if use by the public in general, for a great length of time, cannot be invoked as presumptive evidence of a grant or dedication, or by way of prescription.

The general maxim is, "*Nullum tempus occurrit regi.*" No time runs against the government. Notwithstanding this maxim, it is true that one nation may, by prescription, acquire title against another nation, (*Vattel*, ch. ii, p. 187, sec. 140 to 150,) and individuals may acquire title by prescription against the government. And long possession, use, and enjoyment, by a person, natural or corporate, may be used as evidence presumptive from which to infer a grant, although none such is to be found of record; as in the cases of *The Mayor of Kingston upon Hull v. Homer*, Cowp. 102; *Lord Purbeck's Case*, i Cowper, 102-109; *Crumers and others v. Smith*, xii Co. 4; *Bedle v. Beard*, xii Co. 6; *Rex v. Carpenter*, ii Shower.

All these cases are claims of individual right against the government, that is, against the public.

A prescription may be by an individual against an individual, for a right of common, a right of way, &c., and so a grant from the government may be presumed from length of time, use, and enjoyment.

But, when the general inhabitants of a city, or town, or county, or parish, claim a right, privilege, or easement, in a matter or thing belonging to the government or people, as a nation, there they may make claim by custom, by long-continued usage and enjoyment, which has grown into *law*; not by prescription, but by a law; and produce length of use and enjoyment as evidence of the law. This difference between prescription and custom is an adjudged one. Custom is always local and in the name of many and of no one in particular; prescription is personal. (*French's Case*, iv Co. 32; *Gateward's Case*, vi Co. 61; *Co. Litt.* 113, 6.)

There is no law of Maryland, nor any statute of the United State, to define what length of time shall be sufficient to make a right or title, against the Government, by prescription or by custom.

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When the city of Washington was laid out, and reservation number one was conveyed to the United States, this parcel of land was entire, not interrupted and broken by any street, avenue, alley, or highway; so it was in the year 1800, when the seat of government was removed from Philadelphia to Washington. Then the city had been newly laid out, upon lands owned by individuals, as farms, partly under fence and cultivation, partly in woods; the streets and avenues were not graded, not improved, but interrupted in many instances by ravines, hills, and hollows. Since then they have been, in successive years, opened, graded, improved, and paved. The record proof is clear that this reservation, No. 1, was entire; no circular street or avenue through this reservation, south of the President's Mansion, was in the original plan and plat of the city. No act of Congress has made any such new and additional street or avenue; no trace or evidence exists that the President of the United States, or the Commissioners, or the corporation of the city of Washington, or the Commissioner of Public Buildings, or the City Surveyor, have ever caused such a circular street to be surveyed, measured, and recorded, as an addition to the plan of the town;—there is no record of any such, nor of its courses and width. It is not the extension of any street or avenue, existing in the original plan and plat of the city; it, unlike any of them, being crooked and anomalous. All these collateral circumstances tend to rebut the idea that the primitive plan, purpose, and design of the original reservation, had been broken down, altered, or retrenched, either by Congress itself directly, or indirectly by an authority delegated by the Congress to some other body or person.

Customs are of three kinds: “1. General customs, or the common law properly so called, which are the universal rules of the whole kingdom. 2. Particular customs, which, for the most part, affect only the inhabitants of particular districts. 3. Certain particular laws, which by custom, are adopted and used by some particular courts,” such as the ecclesiastical courts, the military courts, the courts of admiralty, the courts of the two universities. (Black. Com., vol. i, sec. 3, p. 67–83.)

With the first and third of these customs, the question sub-

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mitted has no connection : for the subject-matter is local. With respect to the second class, customs or laws which affect only the inhabitants of particular districts, Judge Blackstone tells us, (vol. i, sec. 3, p. 76,) "To make a particular custom good" * * "it must have been used so long that the memory of man runneth not to the contrary. So that if any one can show the beginning of it, it is no good custom. For which reason no custom can prevail against an express act of parliament, since the statute itself is a proof of a time when such a custom did not exist."

Here the said statute of Maryland, and the statutes of the United States, show a time when the custom in question did not exist.

In conclusion, my opinion is, that this irregular passway, through the public reservation No. 1, south of the President's Mansion, in the City of Washington, has no lawful existence, no authoritative dedication ; that it cannot be upheld by prescription, nor by custom ; and that it may be enclosed, obstructed, and adjoined, by enclosure, to the other public grounds south of the President's House.

I am, very respectfully,

C. CUSHING.

To the PRESIDENT.

 RESIGNATION BY AN INSANE OFFICER.

An act of resignation by an officer of the Navy while insane is a nullity.

ATTORNEY GENERAL'S OFFICE,

May 8, 1854.

SIR: Your communication of the 3d inst., offers the following state of facts, namely :

Some weeks ago, an officer of the Navy forwarded to the Department his resignation, which was accepted ; but subsequently, on investigation, it was ascertained that the officer was insane at the time he resigned, and has remained so since :

Upon which the question arises : "Can the Executive with-

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draw the acceptance of the resignation, and place the officer's name on the register again, without the intervention of the Senate?

In reply, to which, I have the honor to say, that, according to the general principles of law, the resignation of the officer, he being a lunatic at the time, was a mere nullity, which could not be made valid by its acceptance; and, therefore, the acceptance having been made upon misapprehension of the facts, may, in my opinion, be lawfully recalled, as for the mere correction of error, without consulting the Senate.

I am, very respectfully,

C. CUSHING.

Hon. JAMES C. DOBBIN,
Secretary of the Navy.

CLERKS IN THE STATE DEPARTMENT.

The increase of salary for clerks of the three first classes, provided by the act of April 22, 1854, applies to clerks of similar classes in the State Department.

ATTORNEY GENERAL'S OFFICE,
May 10, 1854.

SIR: Your communication of yesterday presents the question of the bearing of the late act of April 22d on the clerks in the Department of State.

The third section of the act of March 3d, 1853, (Session Acts, 1852-3, p. 209,) enacts that from and after the 30th of June, 1853, the clerks in the Departments of the Treasury, War, Navy, the Interior and Post Office, shall be arranged into four classes, of which class, number one shall receive an annual salary of \$900 each; class number two of \$1200 each; class number three of \$1500, and class number four of \$1800 each. The act then proceeds, among other things, to enumerate and classify the clerks in the specified Departments.

It will be observed that the act is silent in regard to the

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clerks in the offices of the Secretary of State, and of the Attorney General.

The first and fourth sections of the act of April 22d, 1854, provides, among other things, that, as to the clerks enumerated in the third section of the act of March 3d, 1853, those of the first class shall, for the fiscal year ending the 30th June, 1854, receive \$1200; those of the second \$1400; and those of the third \$1600, for their salaries respectively.

The second section of the act of April 22d, 1854, proceeds to make provision for a temporary increase of the salary of a large number of subordinate employees in the executive offices at the seat of government, including by name some clerks in the Navy Yard, who do not receive salaries of amount fixed by law, and were not classified by the previous act.

Other provisions of the act provide for the augmentation of various salaries, and otherwise indicate its general purpose and spirit, all in the same beneficial or enabling sense.

The first section of the act further enacts as follows:

“And all clerks not provided for in this act, performing the same or similar duties with any one of the classes, shall receive the same compensation as is allowed to such class.”

This clause of the act cannot be treated as void, superfluous, or insignificant. It was inserted, obviously, in order to give full effect to the liberal purpose of Congress. The legislators intended, what they expressly say, that all executive clerks at the seat of government, though not enumerated in the act, stand in the same need, and come within the cause, necessity, reason, and circumstances for making the statute, as fully as the clerks enumerated.

There is no difficulty in perceiving why the clerks in the offices of State and of the Attorney General, were not classified by the act of 1853, for the mode of classification therein provided, by examination, would ill apply to clerks of so much speciality of duty as those in the two non-enumerated Departments.

If the act of 1854 had stopped with provision for clerks enumerated in the act of 1853, it would have done great injustice to others of equal merit, and the same or higher duties.

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It guarded against any such injustice by declaring that "*all other clerks* (in the executive offices) not provided for in this act, performing the same or similar duties with any one of the classes, (of which fact, the present rate of salary, under the discretionary power of classifications belonging to the Head of the Department, shall be the criterion,) shall receive (for the present year) the same compensation as is allowed (by this act) to such class."

It appears that of the clerks of the State Department, one receives \$800, one \$900, and one \$1000. I think these three clerks are to be deemed as of the first class, and to receive \$1200 each for the present fiscal year.

It further appears, that seven of the clerks in the Department now receive \$1500 each. They are plainly in the analogy of the third class, and are entitled to \$1600 for the present fiscal year.

In the representation addressed to you by the clerks in question, and which accompanies your letter, something is said on the subject of the duties of certain clerks in your office, as entitling them by analogy to be classed in point of salary with clerks of the fourth class, of the act of 1853; but, in my opinion, the act of 1854 cannot be so construed as to carry with it this conclusion. It designed to raise the salary for the current year, of the first three classes, assigning a maximum of \$1600; it did not design to charge the relation of existing classes or *permanent* salaries in any one of the Departments.

I am, very respectfully,

C. CUSHING.

Hon. WILLIAM L. MARCY,
Secretary of State.

Disputed Funds in the Treasury.

DISPUTED FUNDS IN THE TREASURY.

Where a sum of money, standing in the name of A., had been enjoined in a suit in equity by B., and, by due order not appealed, the injunction was dissolved as to a part of said sum, and its payment ordered to C.:—Held, that the Secretary of the Treasury might lawfully pay to C. according to such order.

ATTORNEY GENERAL'S OFFICE,
May 14, 1854.

SIR: I have considered the subject of your letter of the 13th, and have the honor to reply to the same herewith.

The papers submitted show that Stephen Whitney and others exhibited their bill in equity in the proper court of the United States, for the District of Columbia, against Dey, Sumner, and Curtis, claiming certain interest in an award made by the Board of Commissioners under the treaty of Guadalupe Hidalgo, in favor of said Dey, Sumner, and Curtis; upon which bill the complainants obtained an injunction to stay, in the Treasury of the United States, the money due upon the award, of which injunction the Secretary of the Treasury was notified.

Pending the suit, Coxe, Bradley and others intervened, claiming an interest in the award, and were made parties. The defendants all appeared and answered. The court referred the matters in controversy to an auditor, who reported, among other things, that, of the award, the sum of ten thousand dollars was due to said Coxe and others, with interest thereon, at the rate of six per cent. per annum from 16th May, 1851, until paid.

There was no exception by either of the parties to so much of the auditor's report as related to the sum of \$10,000 due to said Coxe and others out of the said award.

As to the interest upon the said sum of \$10,000, the defendants, Dey, Sumner, and Curtis excepted. That exception was sustained by the court.

The court confirmed the auditor's report as to the sum of \$10,000 due to said Coxe and others out of said award of \$50,000 due from the Treasury of the United States; ordered

it to be paid to them; and dissolved the injunction as to the said sum of ten thousand dollars so due to said Coxe and others.

From the dissolution of the injunction there is no appeal, and it ends that question.

The decretal order for paying the said sum of ten thousand dollars to said Coxe and others, was of 29th April, 1854; and upon the papers submitted, it does not appear that said decretal order directing the said sum of \$10,000 to be so paid out of said award, has been in any manner set aside, annulled, or superseded.

Upon this state of the facts, and of the pleadings, the question is, whether the Secretary of the Treasury can lawfully and safely pay to the order of the court the said sum of \$10,000, upon certificate filed that the decretal order for its payment, with dissolution of the injunction *pro tanto*, is yet in full force.

I think he may, no appeal having intervened, nor any other act occurred to supersede or set aside the said decretal order. The United States cannot thereafter be made liable to pay it again; but as mere stakeholders, and having paid by order of court made between the said parties litigant, must be considered, as to that payment, justified and fully acquitted.

Whatever question remains upon the final hearing, or upon appeal, is between the parties litigant only, and does not affect the United States.

I am, very respectfully,

C. CUSHING.

Hon. JAMES GUTHRIE,
Secretary of the Treasury.

Contracts of Indians.

CONTRACTS OF INDIANS.

It is in the discretion of the President whether, and at what time if at all, engagements of indebtedness made by tribes of Indians to citizens of the United States, shall be allowed and paid by the Government. See ante, p. 49.

ATTORNEY GENERAL'S OFFICE,

May 15, 1854.

SIR: By your letter of the 15th ult., and the papers accompanying the same, it appears that certain bands of the Dacotah Indians, in their capacity as such bands, have in council acknowledged themselves indebted in a stated sum of money to Madison Sweetser, for supplies furnished them, and they request the President to pay the same to said Sweetser, out of moneys due them under the treaty with them negotiated by the United States on the 23d of July, 1851. These supplies appear to have been furnished after the date of the treaty, and at any rate are not provided for in it. But the acts of Congress of August 30th, 1852, and March, 1853, in making appropriations for the fulfilment of treaty stipulations with the Indians, contain a general provision that the appropriation shall, in every case, be paid directly to the Indian or Indians themselves, to whom it shall be due, or to the tribe or part of a tribe *per capita*, unless the imperious interest of the Indian or Indians, or some treaty stipulations, shall require the payment to be made otherwise, under the direction of the President. (Session Acts, 1851-2, p. 57; Acts 1852-3, p. 239.)

Upon the above state of the law and facts, the following question is presented to me for consideration, namely:

“Whether the terms ‘imperious interest,’ employed by the statute, have relation to the period at which the obligation is incurred by the Indians, or to the time when the payment of the claim is demanded; and if the former, whether that question, not having been decided, nor the payment sanctioned by the Executive, before the debt was contracted, can now be properly considered?”

I had occasion, in an opinion delivered by me on the 14th of June last, in reference to a similar contract of the Pota-

watomie Indians with one McDonald, to submit to you some conclusions of law which apply to the whole of the present inquiry. (Ante, p. 49.)

Those contracts, like the present one, were national, for supplies to individuals of the tribe; and neither the supplies nor the orders for payment had been previously authorized by the Executive.

I thought in that case, and think in this, that the President is to apply a sound and lawful discretion to the consideration of the debt itself, its occasion, circumstances, and reasonableness, and also to the measure and time of its payment, looking to good faith, justice, and equity, as between debtor and creditor, in the former relation of the subject, and the particular interest of the Indians in the latter relation. It may not be amiss to quote the following paragraphs of that opinion as covering all the parts of the subject.

“If he (the President) ascertains, on examination of these contracts, that they were made in good faith, for lawful consideration of necessities furnished to the Indians, and at a fair price, he may well conclude to pay the appointees according to the terms of the appointment; as, if the contrary appears, he may well, in his discretion, refuse to accept and pay the drafts thus drawn upon him without previous consent and authority; just as, in either case, a guardian or trustee might do, in regard to debts contracted by his ward.

“And if he determines to pay the debts, he can, if he see fit, so apportion the terms of payment, according to the wants of the Indians, and the relation of the debts to the sums due them as annuity at a given time, as may be requisite in the beneficial administration of the estate of these Indians in the hands of the United States.”

My opinion, therefore, in the present case, is, that the President, in his relation of guardian of the Indians, is to take into view their situation, both at the time of contracting the debt and at the time of paying it; that it is not requisite that he should, by anticipation, have decided the question of the necessity of the supplies; and that he may now consider and decide the whole question of fact, upon the evidence submitted to him,

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and according to his conscientious judgment of the interest of these bands of Dacotahs.

I am, very respectfully,

C. CUSHING.

Hon. ROBERT McCLELLAND,

Secretary of the Interior.

CLERKS IN THE STATE DEPARTMENT.

The increase of salary provided by the act of April 22, 1854, does not apply to any clerks in the Department of State above the third class.

Declarations of members of Congress in debate on the passage of a law cannot be received to control the legal intendment of the law.

ATTORNEY GENERAL'S OFFICE,

May 25, 1854.

SIR: The communication made to you by Messrs. A. H. Derrick and James S. Mackie, clerks in the Department of State, claiming that their salaries respectively, should by the law of April 22d, 1854, be increased to \$1800 per annum, which is the salary of the fourth class of clerks according to the law of March 3d, 1853, chap. 97, s. 3,— and which communication you were pleased to refer to me for my opinion on the question, has been duly considered.

The act of April 22d, 1854, is, in terms, confined to classes one, two, and three. Class number four is not mentioned in it.

The plain language and evident intention of that act are, to increase the salaries of class number one, from \$900 to \$1200; of class number two, from \$1200 to \$1400; and of class number three, from \$1400 to \$1600 per annum. These are the only classes mentioned. None of the classed salaries are thereby increased above sixteen hundred dollars per annum.

As the act mentions only the three classes, numbers one, two, and three, and gives no increase above sixteen hundred dollars to either of the classes mentioned, nothing is perceived in it, which can be fairly construed, so as to raise any salary to eighteen hundred dollars per annum.

As only three of the classes are mentioned, the words "per-

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forming the same or similar duties with any one of the classes," must be understood to refer to some one of those three classes, not to any other; and so also as to the words, "shall receive the same compensation as is allowed to such class," which relate to such class as may be mentioned in the act itself, not to a class mentioned in a former act, but pretermitted in this.

These gentlemen, in their communication to you, rely upon the speech of "Senator Adams, the originator and advocate of the law, * * as reported in the 'Globe' debates, p. 293," to explain the intention of the framers of the law.

The Supreme Court of the United States say (in *Aldridge v. Williams*, iii Howard, p. 24) "The judgment of the Court cannot, in any degree, be influenced by the construction placed upon the act by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments, that were offered. The law as it passed is the will of the majority of both Houses, and the only mode in which that will is spoken, is in the act itself; and we must gather their intention from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed."

Upon attentive examination of this act, I feel constrained to say that, although it seems reasonable that all the clerks in the offices of the Secretary of State (and, it may be added, of the Attorney General) should be considered by Congress relatively to their merits and the services they perform, still it does not appear to me, that there is anything in the act which will apply, to the clerks of the Department of State, the provisions of the act of 1853, and raise their grades and their salaries so as to conform them to the fourth class in other departments.

I am, very respectfully,

C. CUSHING.

Hon. WM. L. MARCY,
Secretary of State.

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Extradition of Fugitives from Service.

EXTRADITION OF FUGITIVES FROM SERVICE.

A Marshal of the United States, when opposed in the execution of his duty, by unlawful combinations, has authority to summon the entire able-bodied force of his precinct, as a *posse comitatus*.

This authority comprehends, not only bystanders and other citizens generally, but any and all organized armed force, whether militia of the State, or officers, soldiers, sailors, and marines of the United States.

If the object of resistance to the Marshal be to obstruct and defeat the execution of provisions of the Constitution or of acts of Congress, the expenses of such *posse comitatus* are properly chargeable to the United States.

Attempts, in any State of the Union, to prevent the extradition of fugitives from service, are covered by the principles of this opinion.

ATTORNEY GENERAL'S OFFICE,

May 27, 1854.

SIR: Your communication of the 21st of January last, and the papers enclosed therewith, present the following facts:

It appears that on the 2d of June, 1851, a warrant issued from the Commissioner of the United States in the city of Chicago, in Illinois, for the arrest of a fugitive from labor, on the application of Crawford E. Smith, of Missouri. The warrant was directed to the Marshal of the United States for the District of Illinois, who arrested the fugitive in the city of Chicago. Thereupon, a rescue being threatened, the commissioner and the marshal deemed it necessary and proper to call to the assistance of the marshal a police force of twelve men, and also a party of militia, who were in continual attendance for five days during the examination before the commissioner. For the subsistence of this guard the marshal provided; and for such subsistence, and for their *per diem* compensation, he claims payment from the Treasury of the United States.

Hereupon, the question for my opinion is thus stated: "Assuming that the expenses in the case under consideration were incurred prior to the issuing by the commissioner of the certificate surrendering the slave to the claimant, the question arises, are they chargeable to the United States, the same as if incurred after the issuing of the certificate?"

By the act of September 18th, 1850, concerning fugitives from service, (ix Statutes at Large, p. 462,) it is enacted—

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Sec. 5. "That it shall be the duty of all marshals and deputy marshals to obey and execute such warrants and precepts issued under the provisions of this act, when to them directed; * * * and after arrest of such fugitive by such marshal or his deputy, or whilst at any time in his custody under the provisions of this act, should such fugitive escape, whether with or without the assent of such marshal or his deputy, such marshal shall be liable, on his official bond, to be prosecuted for the benefit of such claimant, for the full value of the service or labor of said fugitive in the State, or Territory, or District, whence he escaped."

And by the same section the commissioners appointed under that act are authorized, "within their counties respectively, to appoint, in writing under their hands, any one or more suitable persons, from time to time, to execute all such warrants; * * * with authority to such commissioners, or the person to be appointed by them to execute process as aforesaid, to summon and call to their aid the bystanders, or *posse comitatus* of the proper county, when necessary to insure a faithful observance of the clause of the Constitution referred to, in conformity with the provisions of this act; and all good citizens are hereby commanded to aid and assist in the prompt and efficient execution of this law, whenever their services may be required as aforesaid for that purpose."

Sec. 6 requires the court, judge, or commissioner, upon satisfactory proof that the person arrested does owe the service or labor to the persons claiming him, &c., "to make out and deliver to the claimant, his or her agent or attorney, a certificate, setting forth the substantial facts as aforesaid; * * * with authority to such claimant, or his agent or attorney, to use such reasonable force and restraint as may be necessary, under the circumstances of the case, to take and remove such fugitive back to the State or Territory whence he or she may have escaped as aforesaid."

"Sec. 9. Upon affidavit made by the claimant of such fugitive, his agent or attorney, after such certificate has been issued, that he has reason to apprehend that such fugitive will be rescued by force; * * * it shall be the duty of the officer, making the arrest to retain such fugitive in his custody, and to remove him to the State whence he fled. * * * And to this end the

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officer aforesaid is hereby authorized and required to employ so many persons as he may deem necessary to overcome such force, and to retain them in his service so long as circumstances may require. The said officer and his assistants, while so employed, to receive the same compensation, and to be allowed the same expenses, as are now allowed for the transportation of criminals, to be certified * * * and paid out of the Treasury of the United States."

By the act of August 31st, 1852, (Session Acts, p. 99, chap. 108, sec. 11,) "When the ministerial officers of the United States have, or shall incur, extraordinary expenses in executing the laws thereof, the payment of which is not specifically provided for, the President of the United States is authorized to allow the payment thereof, under the special taxation of the District or Circuit Court of the district in which the said services have been or shall be rendered, to be paid from the appropriation for defraying the expenses of the judiciary."

By these statutes the intention of Congress is sufficiently manifested that no claimant of a fugitive from labor, who obtains a warrant for the arrest, examination, and delivery of the fugitive, is to be charged with costs and expenses incident to the defence of the laws and the officers of the law against lawless persons disposed to rescue the person arrested. The power and the duty of the officers of the law to protect themselves from being resisted and obstructed by lawless force in the lawful execution of precepts to them directed, appertain properly to the officers of the law themselves, not to the individual who appeals to the law to have justice administered to him. For his own acts the claimant is responsible and chargeable, but not for the consequences of a mob or other persons threatening a violent opposition to the execution of the laws of the land. It is the purpose and proper duty of the Government to vindicate and support the majesty of the law against the menaces or violence of rioters and contemners of legal process.

The 9th section of the act provides for paying the costs and charges of guarding against a rescue, even upon the affidavit of the claimant alone, after the certificate of delivery to him,

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“that he has reason to apprehend that such fugitive will be rescued by force.” The reason for paying from the public Treasury the charges of the defensive force employed when the judicial officer and the marshal both apprehend a rescue from threats or other indications known to them, is certainly as cogent as the mere affidavit of the interested claimant.

The law having made it the official duty of the marshals to obey and execute all such warrants and precepts to them respectively directed, and, after the arrest, to keep the person arrested safely, the same law has given to the marshal the power and authority to call to his aid a sufficient force, the whole power of his district, if necessary, or a sufficiency thereof—a competent *posse comitatus*—to guard against threatened rescue. These men, when so called into service, are ministers and agents in the service of the Government,—persons lawfully called to assist in the execution of the laws, and therefore to be paid by the public whilst in the public service.

Such extraordinary expenses in executing the laws are contemplated in the fifth and in the eighth sections of the act of September 18, 1850, and in the act of August 31, 1852, before quoted.

We have seen that the first part of the 5th section of the act of 1850, makes it “the duty of all marshals and deputy-marshals to obey and execute all warrants and precepts issued under the direction of this act, when to them directed;” and renders them responsible for the escape of any such fugitive from labor after arrest and before the certificate of delivery to the claimant.

Hence, by virtue of his office, and the warrant and precept delivered to the marshal, he has full authority, independently of any express provision of statute to that effect, to summon to his aid a sufficient force of his district—the *posse comitatus*—to enable him to perform his duty.

“By the common law the sheriff may raise the *posse comitatus* or power of his county; that is, such number of men as are necessary for his assistance in the execution of the King’s writs, quelling riots, &c., and herein every person above the age of fifteen, and able to travel, is bound to be aiding; and

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if they refuse to assist, may be punished by fine and imprisonment.

"This power is not only allowed the sheriff, but likewise is given to his bailiff or other minister of justice having the execution of the King's writ, who, being resisted in endeavoring to execute the same, may lawfully raise such a force as may effectually enable them to overpower any such resistance; also a constable. * * * So a justice of the peace, who has just cause to fear a violent resistance, may raise the *posse* in order to remove a forcible entry or forcible detainer of lands." (Bac. Ab. Sheriff, (11,) Guil. ed., vol. iv, p. 453; Bouvier's ed. of Bacon's Ab., vol. viii, p. 695; Dalton's Sheriff, chap. 21, p. 104; chap. 95, p. 438; ii Institute, 193.)

"The sheriff, under-sheriff, bailiff, or other such officer, may, if need be, take the *posse comitatus*, and what of other persons they shall think good to execute any writ, process, or other lawful warrant, to them directed, and such as shall not assist them therein, being required, shall make fine to the King. (Dalton's Sheriff, chap. xx, p. 104.)

"When the sheriff or other officer is enabled to take the power of the county, they may commonly and ought to take the aid and attendance of all knights, gentlemen, yeomen, husbandmen, laborers, tradesmen, servants, and apprentices, and all other such persons as are above the age of fifteen years, and that are able to travel. And in such cases there are not appointed any number,—but it is referred to the discretion of the sheriff, &c., what number they will have to attend upon them, and how and in what manner they shall be armed, weaponed, or otherwise furnished."

"The sheriff's bailiff, to execute a replevin, took with him three hundred men, armed (*modo guerrino*) with brigandines, jacks, and guns, and it was holden lawful; for the sheriff's officer hath power to take assistance as well as the sheriff himself." (Dalton, Sheriff, chap. 95, p. 439.)

Upon a writ of seisin the sheriff returned that he could not deliver seisin for resistance. "And for that the sheriff did not take the power of the county, he was amerced." (iv Bac. Ab., Sheriff, (iv) 1, 2, p. 453; Dalt. Sh. chap. 95, p. 438.)

"In replevin, if the sheriff return that the cattle are in a fort or a castle, so as he cannot make deliverance, he shall be amerced because he did not take the power of the county."

"The sheriff, if need be, may raise the power of the county to assist him in the execution of a writ of restitution; and, therefore, if he make return thereon that he could not make restitution by reason of resistance, he shall be amerced." (Bac. Ab. Sheriff, vol. iv, p. 554; Dalton, Sheriff, ch. 95, p. 439.)

Thus it appears that the law affords ample means to the officer to execute all lawful precepts to him directed, and put down all resistance; and, therefore, he is justly responsible if he fails to execute such precepts.

By the 27th section of the judiciary act of 1789, the office of marshal for each judicial district is created, and his powers and duties are defined, among which are: "To execute throughout the district all lawful precepts directed to him, and issued under the authority of the United States; and he shall have power to command all necessary assistance in the execution of his duty, and to appoint, as there shall be occasion, one or more deputies."

Such being the law as to the marshals and their deputies, there was no absolute need, in the 5th section of the act of 1850, to introduce a clause to authorize them to command all requisite assistance in the execution of the warrants and precepts mentioned in that act, which should be directed to them. In this respect the act is declaratory merely.

When, however, in that section, the commissioners were authorized to direct their precepts or warrants "to any person or persons within their respective counties," by the said commissioner appointed to execute them, the act then adds: "With authority to such commissioners, or the persons to be appointed by them, to execute process as aforesaid; to summon and call to their aid the bystanders or *posse comitatus* of the proper county, when necessary to a faithful observance of the clause of the constitution referred to, in conformity with the provisions of this act." Thus the powers, in respect of the necessary assistance, or summoning the *posse comitatus*, which belonged to the marshals and their deputies, *virtute officii*, were

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expressly conferred on the persons to be appointed by the said commissioners.

And in section 9th of this act of 1850, when the duty of the officers who made the arrest,—which otherwise would have ceased at the delivery of the fugitive, upon the certificate of the court, judge, or commissioner, to the claimant, as directed by the sixth section of the act,—is continued and extended upon the affidavit of the party claimant and interested, “that he has reason to apprehend that such fugitive will be rescued by force from his possession,”—then, and in such case, where the officer is required to act in consequence of the affidavit of the interested claimant, such officer is expressly authorized and required “to employ as many persons as he may deem necessary to overcome such force.” In which case, also, the officer and his assistants, for such services, are to be “paid out of the Treasury of the United States.”

I repeat, the *posse comitatus* to aid the officer of the law in the execution of his duty is in the service of the Government, not in the service of the individual who sues out the process of the law to have the justice of the nation administered to him, which administration is of the duty of the Government. To guard against violence by wrongheaded, misguided, disloyal citizens, or by foreign force, is an important obligation of every Government,—the grand purpose and consideration, indeed, for which it is instituted. Hence, when the officer of the law deems it necessary and proper to raise the *posse comitatus*, to aid and assist him in executing the process of the law, the extraordinary expense thereby incurred is properly payable by the Government. Expenses to be paid by the parties litigant are ordinary fees, certainly fixed and taxable, as costs against the party at whose particular instance the ordinary services, in the usual calm and peaceful administration of justice, have been performed, and which the successful litigant recovers of his adversary, as taxed costs for his personal wrong and injury. But it would be contrary to all reason, and wholly unjust, to burden either party with the extraordinary expenses incurred by the officer of the law in raising the *posse comitatus*, and keeping them in his employment for five days, or more, in aiding

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him to perform his duty in obedience to the precept of the law, and in defending its process against the threatened tumults and riotous conduct of lawless men.

The expense, as we have seen, of the sheriff's bailiff, in raising a *posse comitatus* of three hundred men with coats of mail, guns, and colors, in complete military array—*modo guerrino*—were not chargeable to the plaintiff, whose writ of replevin was directed to the sheriff, to be executed according to law; but the conduct of the sheriff's bailiff, in levying at the public charge such a force, to assist and enable him to do his duty as a public officer, was adjudged lawful; for if he had not taken the power of the county, and had returned "not executed for resistance," the sheriff would have been liable to be amerced.

These considerations apply as well to the military as to the civil force employed; for the *posse comitatus* comprises every person in the district or county above the age of fifteen years, (Watson's Sheriff, p. 60,) whatever may be their occupation, whether civilians or not; and including the military of all denominations, militia, soldiers, marines, all of whom are alike bound to obey the commands of a sheriff or marshal. The fact that they are organized as military bodies, under the immediate command of their own officers, does not in any wise affect their legal character. They are still the *posse comitatus*. (xxi Parl. Hist., p. 672, 688, per Lord Mansfield.)

Viewing the several sections of the act of September 18th, 1850, together, as one whole, and in connection with the 11th section of the act of August 31, 1852, *in pari materia*, my opinion, therefore, is, that, "assuming that the expenses" in the case of the arrest of the fugitive at Chicago, "were incurred by the marshal in raising the *posse* of his district to aid him in the execution of the warrant against a threatened rescue, prior to the issuing, by the commissioner, of the certificate surrendering the slave to the claimants," still such expenses are "chargeable to the United States, the same as if incurred after the issuing of the certificate."

As such expenses, incurred by the officer in performing his duty, upon the affidavit of the claimant, "that he has reason to apprehend that such fugitive will be rescued, by force, from

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his or her possession," are to be paid out of the Treasury of the United States; and *a fortiori* such expenses are to be paid out of the Treasury of the United States, when incurred by the marshal, upon his own judgment and that of the commissioner also, of the necessity to guard against a threatened rescue.

This statute of 1850 is enacted to execute a provision of the Constitution, the due and complete execution of which intimately concerns the fate of the Government of the United States and the integrity of the Union. Such a statute deserves, and will receive, a beneficial construction, so that the mischiefs intended to be guarded against may be suppressed by the full use of all the remedies provided by Congress.

I have the honor to be your obedient servant,

C. CUSHING.

Hon. R. McCLELLAND,

Secretary of the Interior.

ENLISTMENT OF ALIENS IN THE ARMY.

Officers of the Army employed in recruiting may lawfully enlist persons not naturalized as citizens of the United States.

ATTORNEY GENERAL'S OFFICE,

May 30, 1854.

SIR: I have considered the letter of the Adjutant General, referred to me by your note of the 11th instant.

The question propounded is, whether aliens by birth, never naturalized as citizens of the United States, can be lawfully enlisted into the army of the United States?

At the breaking out of the American Revolution the doctrine of Great Britain was that native allegiance was perpetual, and not to be renounced by the subject without the consent or act of the government to whom allegiance was due. Nevertheless, the King, by his letters-patent to an alien, could make him a denizen, and Parliament could make an alien a naturalized subject.

After the Declaration of the Independence of the United

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States of America, the several States of the Confederation denied the doctrine of perpetual allegiance by birth, as asserted by Great Britain, and passed laws, each State for itself, by which aliens might renounce allegiance to any foreign state, prince, or potentate, and become a citizen of, and swear allegiance to, the country of their residence and adoption. The Constitution of the United States, in empowering Congress to establish a uniform rule of naturalization, asserts the principle that aliens may renounce their foreign allegiance and become naturalized citizens of the United States.

Under the Confederation the several States contributed their respective *quotas* of troops for the common defence, according to the requisitions of Congress. The States appointed the officers in their own regiments below the rank of colonel, and admitted such non-commissioned officers and privates into companies, battalions, or regiments, as they respectively deemed politic.

The Continental Congress granted commissions in the armies, so furnished for continental service, to aliens, as witness the commissions to the Marquis de la Fayette, the Baron de Kalb, the Baron Steuben, Thaddeus Kosciusco, the Baron d'Arendt, and others.

By resolve of August 27th, 1776, the Continental Congress invited "from the service of his Britannic Majesty such foreigners as are engaged therein; and expecting that among the officers having command in said foreign corps there may be many liberal minds, possessing just sentiments of the rights of human nature, and of the inestimable value of freedom, who may be prompted to renounce so dishonorable a service, by the feelings of humanity and a just indignation at the office to which they were devoted by an infamous contract between two arbitrary sovereigns, and at the insult offered them, by compelling them to wage war against an innocent people who never offended them nor the nation to which they belong, but are only contending for their just rights; and willing to tender to them also, as they had before done to the soldiers of their corps, a participation of the blessings of peace, liberty, property, and mild government," promising to all such of said foreign officers as might leave the

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armies of his Britannic Majesty in America, and become citizens of the United States, lands to them and their heirs in absolute dominion, in the proportions of—to a colonel 1000 acres; to a lieutenant colonel 800 acres; to a major 600 acres, &c.; to every non-commissioned officer 100 acres; and to every other officer or person employed in said foreign corps in like proportion to his rank and pay in the said corps; and, moreover, besides the lands before promised to said officers and soldiers, engaging to give to such officers as shall bring with them a number of such foreign soldiers “such further rewards proportioned to the numbers they shall bring over, and suited to their wants.” (Journals of Congress by Way and Gideon, vol. i, p. 456, and previous resolve of August 14th, 1776, p. 442.)

Many of the Hessians, hired by the King of Great Britain into his service in America, did in fact desert that service, joined the American army, and remained and became citizens of the United States.

There is no principle of the law of nations, no rule of comity between them, which forbids one nation to employ in her military service the subjects or citizens of a foreign nation.

Such being the historical policy of this country, and the general doctrine of public law, if there be any prohibition to the recruiting officers of the Army of the United States against enlisting aliens into the Army, it must be sought for among the positive enactments of the Congress of the United States under the Federal Constitution.

The several States, during the Revolutionary War, contented themselves with making the officers and privates take an oath or affirmation to bear true allegiance to the State, and to observe and obey all orders given them by the officers appointed over them; and the Continental Congress by their resolves of October 21st, 1776, and February 3d, 1778, directed that all officers of the Army and the Navy, and all officers in any civil service of the Continent, should subscribe the declaration and take the oath following: “I —— do acknowledge the thirteen United States of America, namely: New Hampshire, * * * to be free, independent, and sovereign States, and declare that the people thereof owe no allegiance or obedience to George the Third.

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King of Great Britain, and I renounce, refuse, and abjure any allegiance or obedience to him; and I do swear that I will, to the utmost of my power, support, maintain, and defend the said United States against the said King, George the Third, and his heirs and successors, and his or their abettors, assistants, and adherents, and will serve the said United States in the office of * * which I now hold, and in any other office which I may hereafter hold by their appointment, or under their authority, with fidelity and honor, and according to the best of my skill and understanding, so help me God." (Journal of old Congress by Gideon & Way, vol. i, p. 525; vol. ii, pp. 427, 428, 429.)

After the Federal Constitution was adopted, Congress, at its first session, passed the "Act to recognise and adapt to the Constitution of the United States the establishment of the troops raised under the resolves of the United States in Congress assembled," (i Stat. at Large, p. 95,) as follows:

"Sec. 1. That the establishment contained in the resolve of the late Congress of the third day of October, 1787, except as to the mode of appointing the officers, and also as is hereinafter provided, be and is hereby recognised to be the establishment for the troops in the service of the United States.

"Sec. 2. That all commissioned and non-commissioned officers and privates, who are or shall be in the service of the United States, shall take the following oaths or affirmations, viz:

"I, A. B., do solemnly swear or affirm, (as the case may be,) that I will support the Constitution of the United States; I, A. B., do solemnly swear or affirm, (as the case may be,) to bear true allegiance to the United States of America, and to serve them honestly and faithfully against all their enemies or opposers whatsoever, and to observe and obey the orders of the President of the United States of America, and the orders of the officers appointed over me."

That resolve, so alluded to in this act, is to be seen in the 4th volume, Journals of Old Congress, by Gideon and Way, p. 786, together with the resolve therein referred to of October 20th, 1786, p. 714 of the same volume. They contain no direction or regulation whether the troops to be raised are to be, or not

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to be, citizens of the States, respectively, wherein they were to be raised.

The act of March 26th, 1790, to establish an uniform rule of naturalization, (i Stat. at Large, p. 103,) authorized "any alien, being a free white person," who shall have resided within the jurisdiction of the United States for two years, and in a State for at least one year, to make application to any common law court of such State therein, in order to make proof of such residence, and that he is a person of good character, and to take oath to support the Constitution of the United States; the clerk of such court shall record such application and proceedings, and thereupon such person shall be considered as a citizen of the United States; and the children of such person, dwelling within the United States, being under twenty-one years of age at the time of such application, are to be considered as natural born citizens; and also the children of citizens of the United States born beyond sea, or out of the limit of the United States. Further provisions on the subject have since been enacted.

After this came the "Act for regulating the military establishment of the United States," approved April 30th, 1790, (i Stat. at Large, p. 119,) which ordered a certain number of troops to be raised for three years, providing that the non-commissioned officers and privates "shall, at the time of their enlistment, respectively, be able-bodied men, not under five feet six inches in height without shoes, nor under the age of eighteen, nor above the age of forty-six years."

Section 12 provides that they "shall take and subscribe the following oath or affirmation: * * to bear true allegiance to the United States of America, and to serve them honestly and faithfully, against all their enemies or opposers whomsoever, and to observe and obey the orders of the President of the United States of America, and the orders of the officers appointed over them, according to the articles of war."

By section 13th, they "shall be governed by the rules and articles of war," established or to be established.

This act contains instructions to the officers employed in the recruiting service of the Army, as to the men whom they might

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enlist, by giving these as the qualifications of a recruit: "Able-bodied—not less than five feet six inches in height—not under the age of eighteen, nor more than forty-six years." These were the only prerequisites to an enlistment. It was not a prerequisite that the recruit should be a citizen of the United States. An alien was capable by the law of entering into a contract of enlistment, of renouncing allegiance to a foreign government, and becoming a citizen of the United States. By the contract of enlistment he became bound to swear allegiance to the United States, and as soon as he had taken and subscribed the required oath of allegiance and obedience to the United States he became thereby subject to the rules and articles of war; was in a predicament in which he might be liable to punishment for high treason; and was, in some points of view, a naturalized citizen of the United States, by his own acts, and those of the officers of the United States, done in pursuance of law.

By act of March 3d, 1791, (i Stat. at Large, p. 222,) an additional regiment was ordered to be raised under the former regulations.

By act of March 5th, 1792, (i Stat at Large, p. 241,) three additional regiments were ordered under former rules and regulations.

By act of May 9th, 1794, (i Stat. at Large, p. 366,) a corps of artillerists and engineers was ordered to be raised.

By the act of March 3d, 1795, (i Stat. at Large, p. 430,) "for continuing and regulating the military establishment, and for repealing sundry acts heretofore passed upon that subject, section 5, the commissioned officers, who shall be employed in the recruiting service, shall be entitled to receive, for every able-bodied recruit duly enlisted and mustered, of at least five feet six inches in height, and not under the age of eighteen, nor above the age of forty-six years, the sum of two dollars."

By section 15th, "every officer, non-commissioned officer, private, and musician, shall take and subscribe the following oath or affirmation, to wit: "the same oath of allegiance, service, and obedience to orders, hereinbefore last quoted from the 12th section of the act of April 30th, 1790.

The act of May 30th, 1796, (i Stat. at Large, p. 483,) "to

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ascertain and fix the military establishment of the United States," in section 6th enacts :

"That the commissioned officers, who shall be employed in the recruiting service to keep up by enlistments the corps of artillerists, infantry, and dragoons aforesaid, shall be entitled to receive for every able-bodied recruit, duly enlisted and mustered, of at least five feet six inches in height, and not under the age of eighteen, nor above the age of forty-six years, the sum of two dollars."

Section 21st requires every officer, non-commissioned officer, private, and musician, to take and subscribe the same oath of allegiance, service, and obedience to orders and the rules and articles of war, as before quoted from the act of 1790.

None of these acts required a person to be a citizen of the United States as an essential prerequisite to enlistment into the army. But the act of March 16, 1802, (ii Stat. at Large, p. 134,) enacted, in section 11th, "that the commissioned officers employed in the recruiting service, to keep up by voluntary enlistment the corps aforesaid, shall be entitled to receive, for every effective able-bodied citizen of the United States, who shall be duly enlisted by him for the term of five years, and mustered, of at least five feet six inches in height, and between the ages of eighteen and thirty-five years, the sum of two dollars: *Provided*, That this regulation, so far as respects the height and age of the recruit, shall not extend to musicians, or to those soldiers who may re-enlist into the service; and provided that no person under the age of twenty years shall be enlisted by any officer, or held in the service of the United States, without the consent of his parent, guardian, or master, first had and obtained, if any he have. * * *

"Sec. 12. There shall be allowed and paid to each effective, able-bodied citizen, recruited as aforesaid, * * * a bounty of twelve dollars."

This act, for the first time, expressly made citizenship a necessary qualification to entitle the person to be enlisted, and to authorize the recruiting officer to enlist him into the army.

The act of April 12, 1808, "to raise for a limited time an additional military force," (ii Stat. at Large, p. 481,) did not

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dispense with the qualification of citizenship of the United States; and, moreover, in section 9th, enacted "that every commissioned and staff officer to be appointed in virtue of this act shall be a citizen of the United States, or some one of the Territories thereof."

The act of December 24, 1811, "for completing the existing military establishment," (ii Stat. at Large, p. 611,) enacted, in section 2d, "that there be allowed and paid to each effective, able-bodied man, recruited or enlisted for that service, for the term of five years, unless sooner discharged, the sum of sixteen dollars" for bounty; and also when discharged with a certificate of faithful service he shall be allowed and receive, in addition to that bounty, "three months' pay and one hundred and sixty acres of land." Here the words "citizen of the United States" were omitted, and the word "man" substituted.

By act of January 11, 1812, "to raise an additional military force," (ii Stat. at Large, p. 671,) it was ordered, in section 1st, "That there be immediately raised ten regiments of infantry, two regiments of artillery, and one regiment of light dragoons, to be enlisted for the term of five years, unless sooner discharged.

"Sec. 11. The commissioned officers, who shall be employed in the recruiting service, shall be entitled to receive, for every effective, able-bodied man who shall be duly enlisted by him, for the term of five years, and mustered, and between the ages of eighteen and forty-five years, the sum of two dollars: *Provided*, That this regulation, so far as respects the age of the recruit, shall not extend to musicians, or to those soldiers who may re-enlist into the service. * * * No person under the age of twenty-one years shall be enlisted by any officer, or held in service, * * * without the consent, in writing, of his parent, guardian, or master, first had and obtained, if any he have.

"Sec. 12. There shall be allowed and paid to each effective able-bodied man, recruited as aforesaid, * * * a bounty of sixteen dollars, * * * three months' extra pay, and one hundred and sixty acres of land," if discharged with a certificate that he has faithfully performed his duty.

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Sec. 18 prescribes the oath of allegiance, as hereinbefore quoted from the act of 1790.

In this act the qualification for a recruit, of being a citizen of the United States, is omitted.

The act of January 20th, 1813, (ii Stat. at Large, p. 792,) enacted, section 4: "That, in order to complete the present military establishment to the full number authorized by law with the greatest possible dispatch, there shall be paid to such effective able-bodied man, who shall be duly enlisted into the service of the United States, after the first day of February next, for the term of five years or during the war," an advance of twenty-four dollars on account of his pay, in addition to the existing bounty, and a bounty of 160 acres of land, as heretofore established by law.

Sec. 5. The recruiting officer shall receive "for every effective able-bodied man who shall be duly enlisted * * between the ages of eighteen and forty-five years, the sum of four dollars." The regulation as to the age of the recruit not to extend to musicians and re-enlisted soldiers.

On the 10th of December, 1814, "An act making further provisions for filling the ranks of the Army of the United States," (iii Stat. at Large, p. 146,) in section 1st, enacted: "That from and after the passing of this act each and every commissioned officer, who shall be employed in the recruiting service, shall be, and is hereby authorized to enlist into the Army of the United States any free, effective, able-bodied man, between the ages of eighteen and fifty years; which enlistment shall be absolute and binding upon all persons under the age of twenty years, as well as upon persons of full age; such recruiting officer having complied with all the requisitions of the laws regulating the recruiting service."

Sec. 2d directs that the recruiting officer shall not pay or deliver to a recruit under twenty-one years of age any bounty or clothing, nor restrain him of his liberty, "until the expiration of four days from the time of his enlistment; and it shall be lawful for the said recruit, at any time during the said four days, to reconsider and withdraw his enlistment, and, thereupon, he shall be forthwith discharged and exonerated."

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Sec. 3d repeals so much of the former act as required the consent of the parent, guardian, or master, to authorize the enlistment of persons under the age of twenty-one years, and provides, in cases of enlisted apprentices, that a certain portion of the money bounty shall be paid to the master, to be graduated by the unexpired term of the apprentice's service to his master, in manner specified in the act.

This act explicitly defines the description of persons whom the recruiting officers may lawfully enlist into the army. It is a positive regulation; a peremptory instruction to the recruiting officers. The qualification of being a citizen of the United States was omitted in this, as it had been in the previous acts of December 24th, 1811, January 11th, 1812, and January 20th, 1813.

That omission was designed with an eye to its appropriate effect; being intended by the legislature to enlarge the means of filling the ranks of the Army. On the 24th of December, 1811, the military establishment was largely increased, because of the expected war; and in 1813 and 1814, the means of filling the ranks were increased by enlarging the classes of persons who might be recruited, and by additional bounties, because of the existing war with Great Britain.

By the act of July 5, 1838, (v Stat. at Large, p. 260,) section 30, so much of former acts "as fix the height of enlisted men at five feet six inches, be, and the same are hereby repealed."

The act of January 12, 1847, (ix Stat. at Large, p. 118,) entitled "An act to encourage enlistments in the regular army," contains nothing, which can, by the remotest implication, introduce into the regulations and instructions to the recruiting officers of the Army, an injunction to enlist no persons but such as were citizens of the United States.

Sec. 1st provides, "That during the continuance of the war with Mexico, the term of enlistment of the men to be recruited for the regiments * * * of the present military establishment, shall be during the war or for five years, at the option of the recruit, unless sooner discharged.

"Sec. 2. That there shall be paid to every able-bodied man,

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who shall be duly enlisted to serve in the artillery or infantry for the term of five years or during the war, a bounty." * * *

The expression "able-bodied man" certainly does not refer, solely and exclusively, to one who is a citizen of the United States.

To resume, then, from the time of the declaration of the independence of these United States, down to the act of Congress of March 16, 1802, it does not appear that to be a citizen of one of the States, by birth or naturalization, was an essential qualification of a recruit, or of voluntary enlistment into the military service of the United States. By the act of 1802, the recruiting officers were instructed to enlist into the army only citizens of the United States. That regulation was omitted and abrogated by the act of December 24, 1811, and has not been re-enacted in any subsequent law, according to my understanding of the statutes.

We are now in the seventy-eighth year of the independence of the United States of America, during which time, persons not citizens of of the several States, nor of the United States, since the uniform rule of naturalization was enacted by Congress, might lawfully, by voluntary enlistment, engage in the military service of the United States, with the exception of the period from March 16, 1802, to December 24, 1811, less than ten years out of the seventy-eight now nearly completed.

It is true, the limitation remains as to the militia. But to raise armies by voluntary enlistments, and to do so by calling forth the militia, are different things, belonging to distinct powers of the Government of the United States.

Enlistments into the Army are contracts for military service, made by mutual agreement between the Government and the soldiers respectively; and, therefore, may be made with persons who are, or are not, citizens of the United States.

But the calling forth of the militia into the service of the United States, is compulsory upon the militia; it is a power to be exercised only upon those who are citizens, and not upon aliens. Therefore the acts of Congress have never commanded aliens, but citizens only, residing in the respective States, to be enrolled in the militia.

International Extradition.

Congress, in authorizing aliens to be recruited into the armies of the United States, has taken care that they shall, respectively, swear or affirm to bear true allegiance to the United States of America, and to serve them honestly and faithfully against all their enemies or opposers whomsoever; and to observe and obey the orders of the President of the United States, and of the officers appointed over them, according to the rules and articles of war. To more than this no native-born citizen of the United States, who may be enlisted in the Army of the United States, can be bound.

My opinion, therefore, formed under a due sense of the importance of the question propounded, in reference to our foreign relations, to the powers of our own Government, to the true exposition of the statutes of the United States, and the well-being of our armies, clearly is, that under the law of the United States, the officers of the Army employed in the recruiting service, are not restricted to enlistments of citizens of the United States, but may lawfully enlist persons not naturalized as citizens of the United States.

I have the honor to be, very respectfully, your obedient servant,

C. CUSHING.

Hon. JEFFERSON DAVIS,
Secretary of War.

INTERNATIONAL EXTRADITION.

The United States will not make demand for extradition of a person alleged to be a fugitive from the justice of one of the United States, and to have taken refuge in Great Britain, except on the exhibition of a judicial "warrant" duly issued, on sufficient proofs, by the local authority of the State in which the crime is alleged.

ATTORNEY GENERAL'S OFFICE,

May 31, 1854.

SIR: I have your letter of this date, requesting a requisition on the British authorities in Canada for the extradition of

International Extradition.

William Brown, a fugitive from the justice of the State of Ohio, under charge of the crime of murder.

The practice of our own Government, as well as that of Great Britain, requires that all claims of extradition should be founded on a judicial warrant, with proper evidence to justify the warrant; and the government, of which extradition is demanded, thereupon causes the party accused to be arrested, and examined judicially, and if, on such examination, evidence of criminality be submitted sufficient, according to the laws of the country in which the examination takes place, to justify the commitment of the accused for trial there, then his extradition is granted by that government.

The act of Parliament of vi & vii Victoria, ch. 76, for giving effect to the treaty with the United States for the apprehension of certain offenders, expressly assumes, in section 2d, that the demand for extradition is upon a "warrant" issued in the United States.

Such a warrant might issue upon indictment found, or upon lawful testimony before a committing magistrate. But judicial inquiry and authority are the indispensable prerequisites of the demand for extradition.

The very frequent demands on the United States for the extradition of fugitives from the justice of Great Britain, and the public sensibility which they sometimes awaken, have compelled us to require that this subject should be surrounded with all the ordinary conditions of legality, in regard as well of judicial forms as of evidence. And we can ask of Great Britain in this respect no more than we can concede to her.

In this case, the only document presented is an affidavit as follows:

"The State of Ohio, Greene County, ss:

"Before me, T. Marshall, one of the Justices of the Peace for said county, personally came John G. Kyle, who being duly sworn according to law, deposeth and saith that, on the 8th day of April, 1854, at the County of Greene and State of Ohio, one Sarah Ann Brown, wife of one William Brown, was purposely and of deliberate and premeditated motive murdered by another person; and this deponent saith, that said William

International Extradition.

Brown is guilty of the fact charged; and further, the deponent saith not.

(Signed) JOHN G. KYLE."

This affidavit is then certified by the justice of the peace named, whose authority as such is certified by the Probate Judge of Greene county.

Supposing the due evidence of the authority of the magistrate in this case,—which is wanting, because neither the authority nor the signature of the Probate Judge are known to the Secretary of State,—to be supplied,—as it might be probably, by yourself,—yet the document is deficient in substance, it being a mere complaint under oath. Upon this complaint, the magistrate in Ohio may have issued a warrant; but none appears; and if he had, this complaint would avail nothing, either under the treaty, or the act of Parliament, because, although it might justify the "apprehension" of the accused, still it would not justify his "commitment for trial," to do which explicit and circumstantial testimony would be necessary, as well by our own laws, as by those of Great Britain.

I advise, therefore, that you suggest to your correspondent to have the party indicted, and to make the demand on the indictment, or if any consideration of time, or other obstacles forbids this, then to obtain a magistrate's warrant, accompanied with depositions affording sufficient evidence of the guilt of the accused to justify his being committed for trial, unless it is contemplated to carry the witnesses to Canada to be examined orally there.

I am, very respectfully,

C. CUSHING.

Hon. A. HARLAN,
House of Representatives.

Passenger Laws.—Pardoning Power.

PASSENGER LAWS.—PARDONING POWER.

In cases of mere forfeiture or other penalties accruing to the Treasury under the acts of Congress relative to the transportation of passengers, the Secretary of the Treasury may remit, as in similar cases arising under the revenue laws. This does not exclude the general power of the President to pardon; and where, under the same passenger laws, personal punishment is inflicted, the case can be reached only through the pardoning power of the President.

ATTORNEY GENERAL'S OFFICE,
May 31, 1854.

SIR: In the case of the Belgian ship *Bellona*,—arrested under process of attachment at the suit of the United States, issued from the District Court of the Southern District of New York, for alleged violation of the provision of the act of February 22d, 1847, regulating the transportation of passengers,—the judge of the said court has made certificate to you, that the parties acted in good faith, and with intention to conform to the laws in this behalf, and presents it as a case for remission by you, pursuant to the act of March 3d, 1797. (i Statute at Large, p. 506.)

The same thing has been done in the case of the American ship *Enterprise*, under attachment, in the same legal circumstances as the *Bellona*.

These cases have been referred to me in a memorandum from your office, suggesting that they come within the pardoning power of the President.

The act of February 22d, 1847, in its 1st section, as amended by the 8th section of the act of May 17th, 1848, (ix Stat. at Large, p. 127 and p. 220,) defines the portion of space in a passenger ship, which the law requires for each passenger, and for excess of passengers, and subjects the master to imprisonment, and also to a fine of fifty dollars for each passenger in excess.

The 2d section is in the following words:

“That if the passengers so taken on board of such vessel, and brought into or transported from the United States aforesaid, shall exceed the number limited by the last section, to the number of twenty in the whole, such vessel shall be forfeited

 Passenger Laws.—Pardoning Power.

to the United States aforesaid, and be prosecuted and distributed as forfeitures are, under the act to regulate duties on imports and tonnage."

Sec. 3d imposes a penalty on "the master of said vessel, and the owner thereof," of five dollars for each and every passenger on board, provided the berths be not of certain prescribed dimensions.

Sec. 5th is to the effect, that the amount of the several penalties imposed by the act, shall be liens on the vessel or vessels violating its provisions, and such vessel may be libelled, and sold, therefor, in the District Court of the United States (for the district) in which such vessel shall arrive.

If the enactments of this law, in so far as regards the arrest of the ship itself, be analyzed and collated, they are:—

1. The imposition of certain personal penalties, accruing wholly to the United States, for unlawful construction of berths, or for excess of passengers, which constitute a lien upon the vessel, for which she may be libelled and sold on proper process in the District Court; and,

2. The prosecution and forfeiture of the ship, and the distribution of the proceeds after sale, as for a violation of the revenue laws, in case the excess of passengers shall amount to twenty.

Now, in regard to all such portion of these penalties as goes to the United States, and the sentence of imprisonment, if inflicted under the 1st section, it is not to be doubted that the President has the power to pardon.

I have already had occasion to consider the question of the pardoning power as applied to this class of cases in an opinion of the 24th of March last, in the case of the steamship "New Orleans." The penalties under this statute, although differing by species, do not differ by nature, from those under the revenue, the embargo, and the slave trade acts, decisions upon which have been made by the courts, or by my predecessors, (see opinion of Mr. Berrien, March 17th, 1830, Opinions, p. 697; Mr. Clifford's, May 13th, 1847, Opinions, p. 1848,) affirming the power of the President.

There is no doubt also, that, where the President has power

 Passenger Laws.—Pardoning Power.

to pardon, that power is not necessarily limited by the fact that a power of remission, whether partial or total, is lodged somewhere else. (Mr. Taney's opinion of December 28th, 1831, Opinions, p. 798-804.) But it may well be doubted, whether the President has power to remit that portion of any penalty which has vested by law in some party other than the United States. This doubt is very emphatically expressed by Mr. Justice Washington, in the case of the *United States v. Lancaster*, (iv Washington's C. C. R. 66,) and by the Attorney General Clifford, in the case of the brig *Titi*. (Opinions, May 13th, 1847, p. 1850.) The signification and scope of the word "pardon" are to be ascertained by means of common law authorities, (*United States v. Wilson*, vii Peters, 160;) and it seems to be well settled in Great Britain, that the King cannot, by pardon, remit penalties the right to which has vested individually. (See the cases cited in *United States v. Lancaster*, *ubi supra*, and in my opinion, above referred to, of March 24th, 1854.)

And it may be doubted whether the President ought not as a general rule to abstain from the exercise of the power to pardon, where the law has provided other means of redress.

The material question is, whether there be such in the present case?

As we have already seen, the 2d section of the act of 22d February, 1847, declares that "such vessel shall be forfeited to the United States aforesaid, and be prosecuted and distributed as forfeitures are under the act to regulate duties on imports or tonnage."

The act alluded to, passed March 2d, 1799, sec. 89, directs that all fines, penalties, and forfeitures, shall be prosecuted by the collector "in the name of the United States of America," the collector to receive the money, "and on receipt thereof, the said collector shall pay and distribute the same without delay according to law." * *

Sec. 91 directs, "That all fines, penalties, and forfeitures, recovered by virtue of this act, (and not otherwise appropriated,) shall, after deducting all proper costs and charges, be disposed of as follows: one moiety to the use of the United States, and paid into the Treasury thereof, by the collector receiving the

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same; the other moiety shall be divided between, and paid in equal proportions to the collector and naval officer of the district, and surveyor of the port, wherein the same shall have been incurred, or to such of the said officers as there may be in the said district. * * * * Provided, that if recovered by virtue of information given to the collector by any person other than the naval officer or surveyor of the district, the one half of the moiety shall be given to the informer, and the remainder distributed to the collector, naval officer, and surveyor, or such of the officers as there be in the district, provided, also, that where any fines, penalties, and forfeitures, incurred by virtue of this act, are recovered in consequence of any information given by any officer of a revenue cutter, they shall, after deducting all costs and charges, be disposed of, * * one fourth part to the United States, * * one fourth part for the officers of the customs, * * and the remainder thereof to the officers of such cutter, to be divided among them agreeably to their pay." * * (i Stat. at Large, p. 695.)

The act of March 3d, 1797, (i Stat. at Large, p. 596,) not obsolete, as erroneously stated in some of the editions, but made perpetual by act of February 11th, 1800, (ii. Stat. at Large, p. 6,) authorizes the Secretary of the Treasury to remit or mitigate fines, penalties, *forfeitures* and *disabilities*, arising under the laws to regulate duties on imports or tonnage, and other laws therein mentioned, upon a certificate of facts in a certain prescribed form made to him by the proper district court.

It seems to me the natural construction of the language of the act of 1847, and conformable to the intention of the legislature, to assume that the power of remission or mitigation by the Secretary of the Treasury is comprehended in the provision that where the ship is forfeited, she shall be "prosecuted and distributed as forfeitures" are, under the act of 1799, and the other acts in *pari materia*. In this view of the subject there is perfect unity and concordance in this respect, in all cases of the forfeiture of vessels by process of collectors: otherwise there would be unjust and anomalous exception in the case of forfeiture under the passenger laws.

That, in some cases heretofore, this has been overlooked,

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they having been sent to the President as cases of pardon, prove nothing, any more than the fact, that in a multitude of cases of seizure now pending, the seizures are made under a new construction of law, proves that such new construction is erroneous, or constitutes a legal answer to the prosecutions.

An erroneous construction of a law, in the mere practice of one of the departments, cannot repeal the law.

The fact that Judge Betts, of the Southern District of New York, has taken jurisdiction and certified these cases, is a legal decision of the question of the power of the Secretary, which decision, although not conclusive like a decision of the Supreme Court, yet is entitled to great respect, by reason of the intelligence and experience of that judge.

As to the power of the Secretary to remit, as derived from the statute, it depends on the language of the statute for its limits, and is not subject to the doubts, which exist, as to the extent of the pardoning power of the President.

In a case arising under the act of 1797, the Secretary, by warrants dated after the condemnation and execution in the hands of the marshal, remitted the forfeiture of a vessel and her cargo, libelled by the collector for breach of the revenue laws, and it was adjudged a sufficient justification to the marshal for refusing to proceed to collect the distributive share of the money due to the collector and naval officer. That is to say, the power of remission, by the Secretary, covers the share of the penalty accruing to individuals, as well as that of the United States. (*United States v. Morris*, x *Wheaton*, p. 287; *McLane v. U. States*, vi *Peters*, p. 425.)

In proceeding under the statute to obtain a remission or mitigation, the party must present his petition to the judge, setting forth the circumstances of his case, causing reasonable notice to be given to the person or persons claiming such fine, penalty, or forfeiture, and to the attorney of the United States for such district, that each may have an opportunity of showing cause against the mitigation or remission thereof. The judge is to inquire into the facts, and to certify them with the petition to the Secretary of the Treasury, who may remit or mitigate in

whole, or in part, if, in his opinion, "the same shall have been incurred without wilful negligence or any intention of fraud."

As the precise ground of remission or mitigation is defined by the statute, and the party, having interest in the penalty or forfeiture, has notice to show cause against the remission or mitigation, it is reasonable that the power to remit or mitigate should be of more extent than the power to pardon, which is an act of a mere grace granted on an *ex parte* statement, without regular opportunity to individuals having private interests to show cause why those interests shall not be defeated by a mere act of grace.

So also by the act of February 28th, 1839, (v Stat. at Large, p. 322, chap. 36, sec. 6,) the courts have authority, in their discretion, to remit the whole, or any part of forfeited recognisances, if it shall appear to the court that there has been no wilful default of the parties, and that a trial can, notwithstanding, be had in this cause.

In cases where the law itself, in its foresight, has provided that fines, penalties, forfeitures, and disabilities, incurred without wilful default or *mens mala*, may be remitted or mitigated without applying to the President, it would seem to be a good general rule to be adopted by the President, not to exercise the power of pardon until after the parties shall have applied for remission or mitigation according to the rules and modes prescribed by law, or until it appear that the authority vested by law in others cannot be exerted; or, where the parties applying for pardon have failed to use such legal means for remission or mitigation, that some reasonable excuse for such default should be made to appear to the President.

If he exert his power of pardon in the first instance, and whilst the authority to remit or mitigate may yet be exerted by others, it would follow that, if any qualification or condition annexed to the pardon did not please the applicant, he might then have recourse to that other mode of relief, and thus contrariant results would be exhibited, evincing the inutility of the application to the President first instead of last, and implying that the President had interfered, by his pardoning power, in a case,

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which, instead of being pretermitted in the law, had been fully provided for by the wise foresight of Congress.

Although the provisions of the statute, for remission or mitigation by others, do not supersede the ultimate power to pardon, still it would seem that the pardoning power should, except in special cases, be held in reserve for contingencies, wherein the positive provisions of the law, by reason of their generality, shall have been found deficient.

It seems inconvenient, and against public policy, that questions of relief, for which there is full and adequate remedy by assigned legal processes, should be devolved upon the mere discretion of the President.

In regard to forfeitures, which admit of being referred to the Secretary of the Treasury, sufficient and convenient means exist for taking evidence, and for having the mitigating facts fully and fairly ascertained through the agency of the courts of justice, but no such means exist for informing the conscience of the President.

Indeed, the Secretary of the Treasury is but the agent of the President, in the exercise, here, of a part of his executive authority, and subject to his direction therein. So that the provisions for the remission of penalties by the Secretary of the Treasury have several objects. One is, to cover questions, to which it may be doubtful whether the pardoning power applies, that is, the rights of third persons. Another is to relieve the President personally of the duty in question, by defining the Head of Department, who may do it in his stead, but under his appointment and direction. Another is, to furnish the elements of proper decision by means of judicial investigation. All these considerations combine to dictate that, where the power to remit is given to the Secretary, it should be exercised by him.

In two opinions given by Mr. Taney, (of December 28th, 1831, and January 8th, 1832, Opinions, p. 798, 807,) it is held that the President may direct the District Attorney to enter a *nolle prosequi*, as a branch of the pardoning power, and to discontinue a prosecution, where, in his judgment, the public interests require it; for, in the discharge of his constitutional duty to see that the laws be faithfully executed, he is to take care

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that they be not executed oppressively to individuals, or to the public injury, or in fraud of their true purpose and spirit. But Mr. Taney carefully applies this power to the case where no forfeiture did or could vest individually, and manifestly doubts of the propriety of applying it where any such individual right may have vested, by the due course of law.

Although the power of the Secretary of the Treasury to remit, in cases under the 5th section of the act of 1847, is not so clear to me as his power in regard to cases arising under the 2d section, still the fact of the vessels being subject to lien and consequent process, even for cases arising under the 5th section, seems to bring them within the letter as well as the spirit of the act of 1797; for the contingency provided for by that act is, if any vessel "subject to any seizure, forfeiture, or disability;" and certainly the provisions of the 5th section involve both seizure and disability, though not distributable forfeiture, and Judge Betts may well have regarded the act as entire in what concerns the powers of the Secretary.

On consideration, therefore, of all the relations of the subject, my opinion is:

1. The President has power to pardon all of the offence described in the 1st and 2d sections of the act, unless perhaps in so far as regards a forfeiture, the right of which may have duly vested in the custom house officers, or others, except the United States.

2. It is doubtful whether the President has power to remit such forfeiture, as well in view of the rule of law in Great Britain defining the power, as of the analogies of our own acts of Congress.

3. The Secretary of the Treasury has complete power to remit all forfeitures arising under the 2d section of the act of 1847, application for such remission being made to him, in due form of law.

4. The President has undoubtedly the power to pardon in all cases arising under the 5th section of the act of 1847.

5. I incline to think that the Secretary of the Treasury has concurrent power to remit, in the latter class of cases; but, if that be doubtful, the doubt can be cured by the authority of

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the President, as no interest but that of the United States is affected.

6. As, in cases of seizures and prosecution instituted by the officers of the customs, the act of 1797 affords the means of judicial investigation as to the question of remission, it is more convenient to dispose of this class of seizures in that way than to refer them to the unaided discretion of the President.

This view of the subject is in strict analogy with the general spirit of the acts of Congress, which exhibit a unity of consistent thought in this relation, by providing that where forfeitures of vessels are sued by the officers of the customs, the Secretary of the Treasury, in whose immediate jurisdiction those officers are, shall have the power, under certain regulations, to remit those forfeitures without recurrence to the pardoning power of the President.

I am, very respectfully, your obedient servant,

C. CUSHING.

Hon. JAMES GUTHRIE,

Secretary of the Treasury.

RESCISSION OF A POST OFFICE CONTRACT.

In case a contract for services be rescinded by the United States, without malfeasance of the other party, and after the services have been partly performed by him, if he claim unliquidated damages as for breach of contract, the case is beyond the powers of the accounting officers of the Treasury; but if he waive all other claims, and elect to take payment as for part performance in discharge of the contract, it is a mere question of account to be passed by the proper Auditor and Comptroller.

ATTORNEY GENERAL'S OFFICE,

June 1, 1854.

SIR: I have considered the case of William L. Blanchard, referred to me by your note of yesterday, and have the honor to submit herewith my opinion in relation thereto.

In the month of April, 1851, a contract was entered into between a special agent of the Post Office Department on the one part, and Absalom Woodward and George Chorpennning on

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the other part, for the transportation of the mails of the United States from Sacramento in the State of California to Salt Lake in the Territory of Utah, and back, for the stipulated price of \$14,000 per annum, for a period commencing May 10th, 1851, and ending June 30th, 1854, which contract, on the 15th of January, 1852, was approved by the Postmaster General, (Hall,) in virtue of authority given to him by the joint resolution of January 13th, 1852, (Session Acts 1851-2, p. 145.)

On the 18th of November, 1852, the Postmaster General (Hubbard) annulled the contract for the reason assigned of "repeated failures," which is lawful cause within the competency of the Department, the power to annul for repeated failures being reserved in the contract by express stipulation.

On the same day, the Postmaster General ordered a contract for the same route to be entered into with William L. Blanchard, which was done.

This contract, dated January 19th, 1853, provided as follows:

"For transporting the mail on route No. 5066 from Sacramento City, California, by Carson's Valley to Salt Lake, Utah Territory, and back, once a month on mules, with the privilege of delivering the mails at San Diego, instead of Sacramento City, when the route is rendered impracticable by snow, (the contractor furnishing proof of such impracticability,) on condition of the contractor's establishing and maintaining a fortified post at Carson's Valley sufficient for the security and protection of emigrant trains, at fifty thousand dollars per year for and during the term commencing the 15th day of March, 1853, and ending with the 30th day of June, 1856."

The contract, in the usual form of the printed contracts of the Department, contains sundry other stipulations, only two of which are of material importance.

One is the following:

"For which services, when performed, the said W. L. B., contractor, is to be paid by the United States the sum of fifty thousand dollars a year, to wit, quarterly, &c.: said pay to be subject, however, to be reduced or discontinued by the Postmaster General as herein stipulated, or to be suspended in case of delinquency."

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The other clause material to the present inquiry is the following:

"It is hereby stipulated and agreed by the said contractor and his sureties, * * * that the Postmaster General may discontinue or curtail the service, in order to place on the route a greater degree of service, or whenever the public interests require such discontinuance or curtailment for any other cause, he allowing one month's extra pay on the amount of service dispensed with."

On the 22d of April, 1853, it appearing to the Postmaster General, (Campbell,) that the contract of Chorpenning and Woodward had been annulled without sufficient cause, he,—as stated by him in the official correspondence which is among the papers before me,—for this reason "deemed it proper and just under the circumstances to rescind the arrangement with Mr. Blanchard, and restore the contract to Woodward and Chorpenning;" and for the further reasons stated, in the same correspondence, of the great difference between the two rates of contract, in one case \$14,000, and the other \$50,000, and also because the contract with Blanchard was not made after "giving public notice" by advertising, as it is "the duty of the Postmaster General" to do by the act of March 3d, 1825, s. 10, (iv Stat. at Large, p. 104,) and the act of July 2d, 1836, sec. 2, 3. (v Stat. at Large, p. 85.)

Upon this state of facts, it being assumed for the purpose of the inquiry that Blanchard entered upon, and in good faith performed the contract in part, until it was withdrawn from him by the Postmaster General, the questions presented to me for consideration are:

1. Whether his claim for such services is an "account" to be settled in the ordinary form according to the provisions of the act of July 2d, 1836, (v Stat. at Large, p. 80;) and,

2. If so, what rate of compensation Blanchard is entitled to receive for the service performed.

If this were a case of service discontinued, the contract itself would furnish a complete answer to both branches of the inquiry. But it is, by express terms, a "contract rescinded," not a "service dispensed with;"—and the solution of the

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problem is, therefore, to be sought for, in the general rules of law.

It seems to me, quite unnecessary to discuss the legal relations of the series of acts any further than to ascertain whether the contract was rescinded for violation of contract, or other misfeasance of the contractor. The case presented negatives this; for it expressly states the grounds of rescission, which are all of things done by the United States anterior to the execution of the contract. The annulment of the contract with Woodward and Chorpennig, was the act of the United States. The engagement as to rate of compensation, if excessive, was the act of the United States also, or at any rate, in regard to this, if there be fault, the parties are *in pari delicto*, and no relative advantage on *that* account can be claimed on the side of the United States. And, as to the omission of the Department to give public notice by advertising before making any new contract, and to act on tenders made thereupon, that was a neglect or non-performance of duty by the Postmaster General; but if, which is not well settled, that involves any legal fault on the part of Blanchard, still more was it the fault of the United States.

The inquiry is, therefore, greatly narrowed, to this, namely: What is the true rule of payment by the United States on a special contract for services in part performed in good faith by the party bound to render the service, the contract having been rescinded by the United States, but rescinded for no malfeasance of the other party, and without his consent?

I think the answer to this question is positive and clear on all the authorities.

If the party claim unliquidated damages as for breach of contract, then the case is beyond the powers of the accounting officer of the Treasury. (Mr. Taney's Opinion, July 2d, 1832, ed. of 1841, p. 882.)

But if the party, waiving other claim, elects to accept mere payment as for part performance in pursuance of the contract, then it is an account to be settled for the period of performance at the rate and according to the conditions of the contract. (Robson *v.* Godfrey, 1 Holt N. P. C. 286; Kroon *v.* Greenman, vii Wendell, 121; Dubois *v.* The Delaware and Hudson Canal

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Company, iv Wendell, 285; Rogers v. Parham, viii Cobb, 190; Thompson v. Alger, xii Metcalf, 428, 444.)

In my opinion, such is the right of Blanchard in the present case.

The contract contains a peculiar clause, it being the condition imposed on Blanchard of "establishing and maintaining a fortified post at Carson's Valley for the security and protection of emigrant trains." Without stopping to inquire into the propriety of this condition, involving the question whether the security and protection of the emigrant trains were essential to the security and protection of the mail,—or to inquire how far the imposition of this condition constituted, in the mind of the Postmaster General, an element of the rate of payment stipulated,—it will suffice to say, that the special contract is to pay so much per annum for transporting the mail; and the contract as to that, is not invalidated by the insertion in it of this questionable condition.

I advise, therefore, that a settlement with Blanchard, on the basis of the contract, be made by the proper officers of the Government.

I am, very respectfully,

C. CUSHING.

Hon. JAMES CAMPBELL,
Postmaster General.

SUITS AGAINST MARSHALS.

In case of vexatious suits against Marshals of the United States for lawful acts done by them in the extradition of fugitives from service, the President may authorize the employment of counsel in their behalf by the United States.

ATTORNEY GENERAL'S OFFICE,
June 3, 1854.

SIR: Your reference of the 26th ult. submits the following case:

It appears that in February last a warrant was issued by the judge of the Court of Common Pleas of Luzerne county in the State of Pennsylvania, directed to the sheriff, and commanding

him to take into custody the United States' officers for an alleged trespass committed by them, which pretended trespass consisted of the service of a process duly issued for the apprehension of a fugitive from service under the Constitution and acts of Congress.

The officers of the United States having been arrested under this warrant, applied to the judge of the District Court of the United States for the eastern district of Pennsylvania, for a writ of habeas corpus, which they obtained, and under which they were discharged from arrest.

Hereupon, a rule was sued out and is now pending in the Court of Common Pleas of the State, for an attachment against the sheriff to punish him for his obedience to the order of discharge issued by the District Court of the United States.

And the question is, of the propriety of employing counsel to appear in the court of the State and justify the action of the court of the United States, and the conduct of the sheriff in obeying the order.

It seems to me proper that it should be done, considering the importance of the question, and its general relation to the Constitution and to the authority of the courts of the United States.

It is notorious that systematic plans of resistance to the laws of the United States for the extradition of fugitives from justice and from service, are concocted by evil disposed persons in some of the States.

In some cases, the influence of these persons has sufficed to produce violence and bloodshed, and in others it has led to the scandalous abuse of pretended legal process, and to unseemly attempts on the part of local magistrates to nullify the Constitution and defeat the supreme law of the land.

By means of uniformity and accordance of just decision on the part of the judicial authorities, the majesty of the law will have its due course, faction will be overawed, and the safe and orderly process of justice will relieve the country from the usurped domination of that worst of tyrannies, a lawless crowd of riotous and tumultuary disturbers of the public peace.

In such circumstances, it well becomes the President of the United States, to whom the Constitution has confided the solemn

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trust that "he shall take care that the laws be faithfully executed," to use all due vigilance in defending the officers of the law, and endeavoring to bring the judicial tribunals of the States, in this respect, into concord with those of the United States.

I am, very respectfully,

C. CUSHING.

Hon. R. McCLELLAND,
Secretary of the Interior.

PUBLICATION OF LAWS IN THE NEWSPAPERS.

The provisions of the act of February 26, 1853, regulating the fees of clerks of the courts of the United States and other officers, which provides, among other things, a price for publishing any statute, notice, or order required by law or by the lawful order of any court, department, bureau, or other person in any newspaper, applies only to such a publication in the case of judicial proceedings, and not to the publication of laws and treaties by the Secretary of State.

ATTORNEY GENERAL'S OFFICE,
June 3, 1854.

SIR: I have considered the subject presented by your letters of the 13th of April and the 2d instant.

The act of Congress entitled "An act to provide for the publication of the laws of the United States, and for other purposes," approved April 20th, 1818, (iii Stat. at Large, p. 439, ch. 80,) as amended and repealed in part by the act of May 11th, 1820, (same vol. p. 576, ch. 92,) directs "that the Secretary of State shall, as soon as conveniently may be, after he shall receive any order, resolution, or law, passed by Congress, except such orders, resolutions, and laws, as are of a private nature, cause the same to be published in a number of public newspapers, not exceeding one in the District of Columbia, and in not more than three newspapers in each of the several States and Territories of the United States. And he shall cause to be published in like manner, in said newspapers, all public treaties entered into and ratified by the United States, except Indian treaties, which shall be published only in one newspaper. * * *"

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Sec. 3 (of the act of 1818) enacts "That the proprietor of every newspaper in which the laws, resolutions, treaties, or amendments shall be so published, shall receive as full compensation therefor, at the rate of one dollar for each printed page of the laws, resolutions, and treaties, as published in pamphlet form in the manner hereinafter directed. And if it shall appear, on the examination of any account, that there has been any unreasonable delay, or intentional omission, in the publication of the laws aforesaid, the proper accounting officer of the Treasury is hereby authorized and required to deduct from such account such sum as shall be charged therein, for the publication of any law which shall have been so delayed, or intentionally omitted. And in such case it shall be the duty of the Secretary of State to discontinue the publication of the laws in the newspaper belonging to such proprietor, and such newspaper shall, in no event, be again authorized, nor shall the proprietor thereof be again employed to publish the laws of the United States."

Sec. 4 directs the Secretary of State to cause to be published eleven thousand copies of the acts at large, including resolutions of Congress, amendments to the Constitution adopted, and all public treaties made and ratified since the then last publication of the laws, in pamphlet form, on paper, and in the size of the sheet and type, in a manner to correspond with the late revised edition published by Bioren & Co.," &c. * *

Sec. 7 enacts that in any contract made by the Secretary "with any person for the publication of the laws in pamphlet form, as aforesaid, he shall require at least two good and sufficient sureties, * * * and it shall always be stipulated that the number of copies hereby authorized to be printed, shall be delivered at the office of the Secretary of State within thirty days after the adjournment of each session of Congress, and that for every day's delay in such delivery, the person so contracting shall forfeit the sum of one hundred dollars, to be deducted from the compensation," &c., &c.

The act of August 8th, 1846, modifies the acts of April 20th, 1818, and May 11th, 1820, so far as to limit the number of newspapers for the publication of the laws to two in each State

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or Territory, and in the District of Columbia. (ix Stat. at Large, p. 176.)

By "An act to regulate the fees and costs to be allowed clerks, marshals, and attorney of the Circuit and District Courts of the United States, and for other purposes," approved 26th February, 1853, (Session Acts by Little & Brown, p. 168, ch. 80, sec. 3,) it is thus enacted :

"Printers' fees : For publishing any statute, notice, or order, required by law, or the lawful order of any court, department, bureau, or other person, in any newspaper, forty cents per folio for the first insertion, and twenty cents per folio for each subsequent insertion. That the compensation herein provided shall include the furnishing lawful evidence, under oath, of publication, to be made and furnished by the printer or publisher making such publication."

"The term folio, in this act, shall mean one hundred words, counting each figure as a word. When there are over fifty and under one hundred words, they shall be considered as one folio, but not when there are less, except when the whole statute, notice, or order, contains less than fifty words."

"The bill of fees of clerk, marshal, and attorneys, and the amount paid printers and witnesses and lawful fees for exemplifications and copies of papers necessarily obtained for use on trial in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court, and be included in and form a portion of a judgment or decree against the losing party. Such taxed bills shall be filed in the case."

Upon these statutes the question submitted is, whether the "printers' fees" of the act of 1853, apply to the publication of the laws in newspapers under the act of 1818, 1820, and 1846, and supersede the compensation prescribed by these acts.

It should be observed that, if the act of 1853 is to be construed as repealing the acts of 1818, 1820, and 1846, it must for the same reason be held to repeal the 12th section of the act of March 3d, 1845, which enacts "That in all cases where proposals for any contract or contracts, to be made by any of the Executive Departments or Bureaus, and in all cases where no-

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tices of any description, issuing from the same, are now required by law to be advertised, the same shall be advertised by publication in the two newspapers in the City of Washington, having the largest permanent subscription, and at the discretion of the Executive in any third paper which may be published in said city: *Provided, that the charges for such publication shall not be higher than such as are paid by individuals for advertising in said papers*: And provided also, that the same publications shall be made in each of said papers equally as to frequency."

The same remark may be made as to the advertisements of letters, as well as contracts, ordered by the Post Office Department, and to the advertisements issued by the Public Land Office. If the act of 1853, in employing the expressions,—For publishing any statute, *notice, or order* required by law, or the lawful order of any court, *department, bureau*, or other person,—repeals by implication the rule of payment for publishing the acts of Congress by the State Department, so also it repeals, or at least regulates anew, the rate of payment for advertising notices or orders required by law, of whatever nature, published in a newspaper by any department or bureau.

As the act of 1853 makes no express reference to the several acts of Congress concerning the advertising of the Post Office Department, or to the act of 1845 concerning advertisements of contracts, or to the acts of 1818, 1820, and 1846, concerning the publication of laws and treaties, if the act of 1853 repeals all these it must be by mere implication.

I think no such assumption of the implied repeal of those acts is justified by the tenor of the act of 1853.

On the contrary, it seems to me, that the general nature of the act of 1853, the whole tenor of the particular clause, the technical designation of "fees" given to the price of the printing therein spoken of, the express requisition that these "fees" of "printers and witnesses," shall be taxed by the judge or clerk as costs, the context of the provisions, and other legal *indicia* of the intention of Congress, all converge to the conclusion, that the "printers' fees," contemplated by the act, are only such as arise in judicial proceedings, and that therefore this act leaves untouched the enactments of previous statutes as

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to the amount of compensation to be paid to newspapers for the publication of the statutes and treaties under direction of the Secretary of State.

I am, very respectfully,

C. CUSHING.

Hon. WM. L. MARCY,
Secretary of State.

HOWE'S CASE—PROCEEDINGS OF COURTS MARTIAL.

After sentence of an officer of the Army by a court having jurisdiction has been approved and executed by one President, it cannot be revised by his successor.

The number of persons detailed to constitute a court martial, provided it do not fall below the minimum number of five prescribed by statute, is a matter of discretion within the lawful authority of the officers appointing the court.

An officer may be tried by court martial for the military relation of an act, after having been tried by the civil authorities for the civil relations of the same act.

A prosecution of an officer before court martial having been instituted, and the party arraigned, within the two years required by law, and he pleading the pendency of civil proceedings arising in the matter, whereupon the proceedings of the court martial were suspended until a period after the lapse of the two years: Held, that the statute of limitations could not then be pleaded in the case.

ATTORNEY GENERAL'S OFFICE,

June 5, 1854.

SIR: I have examined the memorial of Major Marshall S. Howe, according to your directions, and the record of the court martial referred to in said memorial, and have the honor to submit herewith the result of such investigation.

The memorial of Major Howe prays that he be restored to his pay and emoluments, as captain of the second regiment of dragoons, which were withheld for a year, by sentence of a court martial pronounced and approved, in May, 1842, upon charges exhibited against him, for alleged cruel treatment, on the 6th of December, 1839, of James Jones, a private soldier under the command of Captain Howe.

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The memorial assumes that the court martial had no jurisdiction of the matter on which it pronounced judgment.

In the consideration of all questions of this class, the distinction to be remembered is that of things void, and things voidable: null for want of jurisdiction, or erroneous only, for misjudgment of a tribunal having competent jurisdiction to hear and determine the case.

If the court had not lawful cognisance of the matter, then its sentence is void, it gives no right, it bars no right, it binds nobody, and all concerned in executing such a sentence are trespassers. (*Wise v. Withers*, iii Cranch, 331; *Elliott v. Piersol*, i Peters 340; *Wilcox v. Jackson*, xiii Peters, 511; *Lessee of Hickey v. Stewart*, iii Howard, 762.)

If the court has jurisdiction, it may rightfully decide every question which occurs in the case; and the "errors and irregularities, if any exist, are to be corrected by some direct proceeding before the same court to set them aside, or in an appellate court." Until reversed by a competent tribunal, the decision is regarded as binding. (*Thompson v. Tolmie*, ii Peters, 163; *Elliott v. Piersol*, i Peters 340; *Wilcox v. Jackson*, xiii Peters, 511; *Cocke v. Halsey*, xvi Peters, 87.)

Unless the memorialist show that the court martial had no lawful jurisdiction of the case, no cognisance of him and the offence charged, his memorial must be unavailing: for the President of the United States has not now any rightful authority to review and reverse the sentence of a court pronounced in a case within its jurisdiction, in 1842, then duly approved by the revising power, and actually carried into full and complete execution.

True it is that the office and powers of the President are perpetual, and every successor has all the powers which his predecessors had whilst in office. But this must be understood of matters executory, of things to be done, and not in relation to matters executed, rightfully and legally transacted.

The case of Captain, now Major Marshall S. Howe, of the second regiment of dragoons, as appearing by his memorial and copy of the record of his trial and defence, is as follows:—On the 10th April, 1840, a general court martial was ordered by

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the commanding general at head-quarters, for the trial of Captain Howe, upon charges of cruel conduct in striking, beating with sticks, kicking, and maltreating James Jones, a private soldier, under the command of Captain Howe, on the 6th day of December, 1839, in East Florida, on the march from St. Augustine to Picolata. The fifth specification, like the others, charged Captain Howe with cruelly beating, kicking, and maltreating said private soldier, Jones, on the 6th of December, 1839, whilst under the command of Captain Howe, with this aggravation, "all of which cruelty did cause the death of said private James Jones, of troop G., second dragoons."

The court martial convened in April, 1840, as ordered, composed of ten officers; Captain Howe objected to two of the officers, for cause, and they were set aside by the court. He was arraigned before the court upon the charges specified.

Thereupon the accused, on the 30th of April, 1840, presented a plea in bar, in which, not confessing any of the matters charged, he alleged that the court martial ought not to take cognisance of the charges, because he says, that at December term 1839, of the Supreme Court of the eastern district of the Territory of Florida, and on the 18th day of the month, the grand jury had found a bill of indictment against him "for manslaughter in killing a certain man, to the grand jurors unknown," and that afterwards a warrant was issued against him, said Howe, for his arrest and trial upon that indictment, that he was arrested upon that warrant, and let to bail for appearance before the court, to answer the indictment; and he avers that the person mentioned as unknown to the jurors, is the same identical James Jones mentioned in the charges and specifications upon which he is arraigned before the court martial, and that the recognisance and indictment in the civil court are yet in force, pending and undetermined: "wherefore he prayed that the court martial would not hold cognisance of said charges and specifications." (Page 8, plea A.)

This plea the court martial overruled. The prisoner then presented a second special plea, to the effect that the charges against him are not proper to be tried by a court martial, but only by a civil court, and that the offence, if committed at all,

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was committed within the county of St. John, in East Florida, and that the Superior Court of the eastern district of Florida, holden at St. Augustine, had jurisdiction of said supposed offence: which he pleads "in bar of the prosecution and trial of him, the said Marshall S. Howe, upon the charges and specifications aforesaid" before the court martial.

This second plea the court sustained, and decided that they could not take cognisance of the offence and specifications for the trial of which the court was convened.

The commanding general approved the decision of the court in overruling the first plea, and disapproved the decision on the second plea, inasmuch as the unmilitary conduct charged ought to have been tried by the court martial, leaving the homicide to be tried by the civil tribunal. However, out of respect to the civil authority, the commanding general deemed it proper "to suspend all proceedings in the case, until the decision of the civil court should be made known. Captain Howe, notwithstanding, would be subject to trial before a court martial for any breach of the military law." (Record, p. 9-10.)

On the 20th of October, 1841, Captain Howe was tried before the court of the Territory of Florida upon the indictment for manslaughter, which had been found against him, and was, by the verdict of the petit jury, and the judgment of the court, thereof acquitted. (Record, p. 24.)

Thereafter, by general orders, from head-quarters, dated Washington, March 2d, 1842, reciting that "the general court martial instituted pursuant to general orders No. 19, dated April 10th, 1840, for the trial of Captain M. S. Howe of the 2d regiment of dragoons having been suspended in its proceedings, for the reasons set forth in general order No. 25 of May 22d, 1840,—and the impediment to the further military prosecution (the officer being in custody of the civil authority at the time) having been removed,—the court will accordingly reassemble at Oglethorpe Barracks, Savannah, Georgia, the 10th day of May next, or as soon thereafter as practicable, to try the charges, and will investigate such other charges as may be preferred against the said Captain M. S. Howe.—Captain J. M. Washington, 4th artillery, and Captain J. R. Irwin, staff, are detailed to take the places of the two members who were set aside by

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the court on being objected to by the accused," &c. (Record, p. 10-11.)

The court martial was accordingly convened on the 10th of May, 1842, and Captain Howe was thereafter arraigned upon the charges and specifications, for cruel conduct in striking, kicking, beating, and cruelly abusing Private Jones of his company, on the 6th of December, 1839.

The accused now pleaded, in bar, his arraignment, trial, and acquittal, on the 20th of October, 1841, on the before-mentioned indictment for manslaughter, showing an authenticated transcript of the record of the trial and acquittal, in the Court of Florida, (p. 17, 19.)

The accused also pleaded not guilty; and thereupon sundry witnesses were examined.

In the written defence presented by the accused to the court martial, he relied,—1. Upon his plea of acquittal by the Court of Florida upon the indictment there found for manslaughter.

2. That the court martial had not "jurisdiction,"—for that "the offence charged has taken place more than two years before the issuing of the order which convenes you here," and he cited "Macomb's Court Martial, p. 40, sec. 68."

3. His written defence contained commentaries on the witnesses and the testimony.

The court martial found him guilty of the greater number of the specified charges, and not guilty of some; and thereupon sentenced the accused, on the 25th May, 1842, "to be suspended from rank, pay, and emoluments for twelve calendar months," (p. 89,) which finding and sentence were duly approved by the commanding general, and carried into execution.

With this prefatory view of the case, I now proceed to take up and consider *seriatim* the several objections to the action of the court suggested in Major Howe's memorial.

I. The number of persons constituting the court.

The 64th of the Articles of War enacts, that "General courts martial may consist of any number of commissioned officers, from five to thirteen, inclusively, but they shall not consist of less than thirteen where that number can be convened without manifest injury to the service." (ii Stat. at Large, p. 367.)

In the present case, the detail consisted of less than thirteen officers, but more than five.

But that is immaterial. For the Supreme Court has determined that the above provision "is merely directory to the officer appointing the court, and his decision as to the number which can be convened without manifest injury to the service, being in a matter submitted to his discretion, must be conclusive." (*Martin v. Mott*, xii Wheaton, p. 19-34-35.)

II. Captain Howe assumes that he was amenable only to the civil tribunal of Florida, and that because he had been tried and acquitted of the indictment for manslaughter in the tribunal of Florida, he was not amenable to the court martial for breach of his duty as captain of dragoons. In this he wholly mistakes the law.

Assault and battery, and homicide, are violations of the municipal laws of the place where committed, to be tried and punished by the proper tribunal of the State or Territory whose peace was broken and laws offended. But the same acts being done by an officer or soldier of the Army of the United States, over and above the breach of the local law, is a breach, also, of the law of the United States, a violation of the rules and articles for the government of the Army of the United States. So, if any officer or soldier of the Army of the United States shall assault and beat his superior officer while in the execution of his office, a double offence is thereby committed, the one against the local law of the State wherein the crime of assault, battery, and breach of the peace was committed, and punishable by that law with fine and imprisonment; the other against the United States, in violation of the rules and articles for the government of the Army, and by that law punishable by "death or such other punishment as shall, according to the nature of the case, be inflicted upon him by the sentence of a court martial." In such case, the offender is punishable both as a citizen, subject to the municipal law of the place, and also as a soldier, or officer, subject to the military law of the United States.

Such double accountability to two different jurisdictions, and to different and double punishments, for the same act, making two different offences, is settled to be lawful by the decisions

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of the Supreme Court of the United States. (*Moore v. The People of the State of Illinois*, xiv Howard, p. 20; *Fox v. The State of Ohio*, v Howard, 434, 435; *United States v. Marigold*, ix Howard, 569.)

This question was fully considered, and treated at large, in my opinion of the 7th of April, 1854, in the case of Surgeon Steiner, who killed Major Arnold, at Fort Graham, in the State of Texas, and, therefore, was in the court of the State indicted for murder, and also proceeded against in a court martial under the authority of the United States. To that opinion, and to the other authorities therein cited, I refer you. (*Ante*, p. 413.)

It is clear that the offences charged against Captain Howe, were offences against the laws of the United States for the government of the Army, and that the special pleas, pleaded by the accused before the court martial, were not sufficient in law to oust the jurisdiction of that court.

III. Another question raised by Captain Howe in his defence, was, "that the offence charged has taken place more than two years before the issuing of the order which convenes you."

This is a plea of the statute of limitation, prescribed by the 88th article of the rules and regulations for the government of the Army. (Vol. 2, p. 369, of *Laws by Little & Brown*, chap. 20.) "No person shall be liable to be tried and punished by a general court martial for any offence which shall appear to have been committed more than two years before the issuing of the order for such trial, unless the person, by reason of having absented himself, or some other manifest impediment, shall not have been amenable to justice."

Neither the pleas of the statute of limitations, nor of *auterfois acquit*, are pleas to the jurisdiction of the court, but pleas in bar, addressed to a court of competent jurisdiction. They confess the jurisdiction of the court, and refer the matter to trial, in that court, to ascertain the truth of the facts, and the law arising out of the facts. A plea of the statute of limitations in bar of the offence charged, admits the cognisance of the court to hear and determine the matters of the offence.

The record exhibits on its face, that the general court martial to try the charges was ordered on the 10th of April, 1840,

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within seven months after the offence had been committed; that when arraigned before the court, the accused pleaded the pending proceedings against him, on the indictment in the civil tribunal; and that, therefore, he himself showed to the court martial the impediment to the progress of that court. The record also exhibits the suspension of the proceedings in the military court, because of that impediment; and that the impediment was removed on the 20th of October, 1841, and that by general orders of March 2d, 1842, the trial of Captain Howe was ordered to be proceeded in, by the reassembling of the court martial on the 10th of May then next, which was done accordingly.

Thus the record shows, that the prosecution was ordered in four months and four days after the offence was committed, and that it was actually proceeded in within less than six months after the impediment was removed: making less than eleven months of delay to prosecute the offence, when the time of the existing impediment and cause of suspension of the proceedings instituted in the court martial, is deducted from the time intervening between the commission of the offence on the 6th December, 1839, to the continuation of the proceedings of the court martial assembled on 10th May, 1842, according to the order of March, 1842.

The court martial, having competent jurisdiction of the case of Captain Howe, upon a hearing of his objection grounded on the statute of limitation, adjudged that the prosecution was within the exception and saving of the statute.

This decision of the court martial, in overruling the exception interposed of the statute of limitation because of the impediment aforementioned, was affirmed by the commanding general, whose duty and authority it was to review, and to reverse or affirm, the decision and sentence of the court martial.

The suspension of the proceedings, because of the pending indictment before the court of Florida, and the respect so paid to the civil magistrate and civil proceedings, were in my opinion justified by the thirty-third article of the rules and articles for the government of the Army; as also by precedents, sound reason,

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and a just principle that the military authority should respect and await an instituted proceeding of the civil authority in cases where they have concurrent jurisdiction over persons who have offended against both the municipal law and the military law. Upon this subject, I refer to what is contained in my opinion of the 7th of April, 1854, on the case of Assistant Surgeon Steiner. It would be superfluous to repeat here that which I have there so largely discussed.

The decision of the court martial upon the case of Captain Howe was within its proper jurisdiction and rightful cognisance; and even if the point had been erroneously decided, it would have been an erroneous decision only, not a void judgment. The error would have been subject to be reviewed and corrected only by the commanding general.

As the general in command affirmed the sentence, and it has been carried into execution, there is now no longer any power competent to review and reverse that sentence. This point is considered in my opinion of the 13th of March, 1854, in the case of Lieutenant Devlin, (*Ante*, p. 369.) That is in accordance with the opinions of Attorney General Wirt, (October 1st, 1823, 1 vol. *Opinions*, ed. 1851, p. 486;) Legare, (3d April, 1843, *Ante*, vol. 4th, p. 170;) Nelson, (6th Nov. 1843, same vol., p. 274;) and Toucey, (Sept. (8th, 1848, vol. 5th, p. 28.)

A decision made and *executed* under one President, is not liable to be reviewed and annulled under the administration of another. Mr. Wirt said, (in the opinion before cited,) "If a decision made, in regard to these gentlemen, eight years ago, during the presidency of Mr. Monroe, is open to review and reversal, I do not see upon what principle of discrimination we can refuse to review and reverse a decision made during the presidency of Mr. Washington, upon the application of any other individual, supposing himself aggrieved by it."

And Attorney General Toucey said: "It might well be asked which of the two high functionaries, exercising the same authority, would, in contemplation of law, be deemed to be in the right—the one who at a proper time, and on a proper occasion, exercised his legitimate authority, according to his best judg-

ment, or the one who undertook to go back into a *past* stage of administration, and to revise and reverse the acts of his predecessor, whose power was equal or identical with his own."

Attorney General Nelson said that the proceedings of the court martial "were exceedingly irregular. Testimony, manifestly illegal, was admitted, whilst that which was legal was ruled to be inadmissible. The sentence pronounced was peculiarly harsh and severe, compared with the facts disclosed by the record. But still I do not perceive how those irregularities can be regarded as annulling the judgment pronounced. They might have been appealed to as reasons why the revising power, when called to act upon the proceedings, should not have approved the finding and sentence of the court; but that approval having been signified, they cannot avail wholly to avoid everything that has been done. The judgment of the tribunals created by the law has been pronounced and carried into effect, and the officer upon whom it operated was unquestionably out of service. The judgment I hold now to be irrevocable."

IV. As to Major Howe's commentaries on the evidence.

It does not appear that any illegal testimony against him was admitted, nor that any testimony for him, which was legal and competent, was rejected.

It does not appear that there was any legal error in the proceedings of that court.

That is to say, a competent court, having lawful jurisdiction of the case, heard it lawfully and regularly, found Captain Howe guilty upon the proofs, and gave a sentence thereon, which was duly approved and executed.

It does not appear that Captain Howe applied to have the sentence disapproved, at the time of the transaction, when any objection of his to the court, the trial, or the finding and sentence, could have been lawfully considered by the appellate power, and its action annulled, or sent back for re-examination, if any lawful cause had existed therefor and been assigned by him.

But now, after the lapse of ten or eleven years subsequent to the approval and execution of the sentence, he applies to the

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President of the United States to annul that sentence, and restore the pay and emoluments of which he has been deprived for twelve months only by the decision of the court.

Such a case, so presented at this time, has no special merits to entitle it to the favor of the Executive.

Upon the most careful consideration of the memorial and the record, however, and doing this as thoroughly as if the case presented itself under favorable circumstances, I feel constrained to say that, in my opinion, there is no shadow of legal cause in fact or in law to declare the sentence of this court void *ab initio*, and no rightful cause or authority to review or reverse the decision for alleged error.

I am, with the highest respect,

C. CUSHING.

To the PRESIDENT.

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In the case of a contract with the Government rescinded for lawful cause, but without fault on the part of the contractor, the latter has no right to vindictive damages, or to any collateral or consequential damages; nor is he entitled to damages in the rate of the contract as if completely performed by him; but the true measure of damages, whether in equity or law, is the actual value of the contract *per se*, and the actual loss of its non-performance.

The Comptrollers and Auditors of the Treasury have no general authority to award damages as for tort, on contract broken: their jurisdiction is confined to matters of account arising *ex contractu* or by operation of law.

ATTORNEY GENERAL'S OFFICE,

June 7, 1854.

SIR: I have considered the question proposed by your communication of the 30th of January.

According to the case stated, it appears, among other things, that on the 16th of September, 1837, the Postmaster General (Mr. Kendall) contracted with Messrs. Strader & Johnson for the performance of certain mail service on the rivers Ohio and Mississippi. By one of the clauses of the contract, it was agreed that "the Postmaster General may discontinue the

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service when he shall consider it necessary to do so, by allowing one month's extra pay to the contractors;" but no authority is expressly reserved to curtail the service. The whole contract was to terminate on the 30th of June, 1842.

On the 6th of February, 1841, the Department ordered that one of the three trips per week of the contract should be taken off, with proportional reduction of compensation; and the contractors were paid one month's extra pay on the trip discontinued.

On the 18th of December, 1841, a new arrangement was made by the Postmaster General, (Mr. Wickliffe,) for the conveyance by other parties, and with other conditions, of the mail which had been taken from Strader & Johnson.

The parties thereupon claimed that, they not having assented to the discontinuance, and being ready to perform, they were entitled to be paid according to the contract, as if they had been suffered to continue the service, from the 18th of February, 1841, to the 30th of June, 1842, when the contract expired by its own terms.

A suggestion is made, in the statement of the case, that Strader & Johnson may, perhaps, be considered as having impliedly assented to the curtailment by accepting the month's extra allowance. But the facts bearing on this point are not sufficiently set forth in the papers to enable me to judge whether this payment, and the acceptance of it, will admit of being treated as a waiver of claim on the part of the contractors; nor, indeed, is any question of the legal character of that act propounded to me.

Strader & Johnson presented their claim to the Department, where it has been pending to the present time.

Latterly, the claim has been urged on the Auditor of the Post Office Department as an account; but he has declined to take jurisdiction; and the case is now referred to me to determine, whether a claim, so situated, is an account within the purview of the statute, which authorizes the Auditor to receive and settle accounts in the Post Office Department, subject, on appeal, to the final decision of the Comptroller.

The case presented to me does not go into the facts by which

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it can be determined whether the act of the Postmaster General, in discontinuing one of the trips, was unlawful or not; and my opinion is not asked on that point; but merely and solely as to the jurisdiction of the claim as a claim.

It has been argued, by counsel for the claimants, with great earnestness, that, Strader & Johnson having been prevented from performing the contract by the Department, they are entitled to compensation precisely as if they had performed it, and that, therefore, the compensation, to which they are thus entitled, is to be treated as any regular account for service under a contract performed.

Undoubtedly, where a condition becomes impossible by the act of the obligor, such impossibility forms no answer to an action on the bond. (Per Tindal, Ch. J., *Benwick v. Swindells*, iii Ad. & E., p. 868.)

So, if the party, who, by contract, has promised to receive an article of merchandise, or the rendition of service, refuse without lawful cause to receive the same, undoubtedly an action lies for damages, on the breach of contract.

But the damages to be recovered are not necessarily identical with the contract price. They may be more, the same, or less, according to circumstances to be proved. (*Philpott v. Evans*, v Mees. & W., 475; *Leigh v. Patterson*, viii Taunt. 540; *Master-ton v. Mayor of Brooklyn*, vii Hill, 61; *Caldwell v. Reed*, Little's Sel. C., 366; *Sedgwick on Damages*, ch. vii.)

And, in a class of cases almost substantially the same as the present, it has been repeatedly adjudged that the contract price is far from being the definitive measure of damages.

On a contract by the proprietor of a canal boat to transport horses therein, for an agreed price, the proprietor of the canal boat brought his action; averring a readiness and offer to perform on his part, and a neglect and refusal on the part of the defendants to furnish the freight; and the plaintiff claimed to recover the entire sum specified in the agreement. But the Supreme Court of New York denied his right to this, and said: "A tender and offer to perform is equivalent to performance, *but merely for the purpose of sustaining an action.* It is not performance, though in one respect it resembles it consequen-

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tially. It is quasi-performance, *but it does not regulate the amount of damage.*" (*Shannon v. Comstock*, xxi Wendell, 457.)

So, in the same State, where the defendant agreed with the plaintiff, keeper of a boarding-house, to occupy apartments in her house for a year, at a specified rate of payment, and left before the expiration of the year,—the court said that the plaintiff "was not entitled, as a matter of course, to the stipulated price for the use of the rooms to the end of the year, but only to such damages as had directly resulted from the breach of the contract." (*Wilson v. Martin*, i Denio, 602; see also *Spencer v. Halstead*, i Denio, 606.)

So, in the same State, where the plaintiff was employed by the defendant to do certain work, and after he began to do it, the order was countermanded by the defendant, and the plaintiff went on to complete the job, and insisted on payment according to the contract price, the court held the contrary, and said that "in all such cases, the just claims of the party employed are satisfied when he is fully compensated for his part performance, and indemnified for his loss in respect to the part left unfinished." (*Clark v. Massiglia*, i Denio, 317; and see *Durkee v. Mott*, viii Barb. S. C. R., 423.)

So, in New York again, where a party was employed as the superintendent of a railroad, for a certain time, at a specified compensation, and was dismissed without cause, though it was held that he was *prima facie* entitled to recover for the whole time, yet the defendants might show, in diminution of damages, that, after the plaintiff had been dismissed, he had been engaged in other business. (*Costigan v. Mohawk and Hudson R. R.*, iii Denio, 610; see also *Heckscher v. McCrea*, xxiv Wend. 304.)

The same doctrine is held in other States.

Thus, in Kentucky, where a plaintiff contracted to do work for a stipulated piece, and was prevented by the other party, the court ruled that the plaintiff was not of right entitled to recover according to the price in the contract, but only the actual damages sustained by him; and, as the plaintiff in this case could not prove damage, he did not in fact recover anything. (*Chamberlain v. McAllister*, vi Dana's R. 352.)

So in Arkansas, the case being of an overseer employed for

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a stated time and rate of compensation, and dismissed without sufficient cause before the expiration of the stipulated term, it was held that, although, as a general rule, where one contracts to employ another for a certain time, at a specified price for the whole time, and discharges him without cause before the expiration of the time, he is bound to pay the whole amount of wages for the full time; yet this general rule has more special reference to the sustaining of the action than to the admeasurement of the damages to be thereby recovered. In other words, although a tender and offer to perform, by the party not in fault, is equivalent to performance for the purpose of sustaining the action, the damages to be recovered are not universally and necessarily to be measured by the amount which was stipulated to be paid on actual performance; but, for the most part, the true rule of damages is the actual loss or injury sustained by the party ready and willing to perform; and the defendant may go into defensive evidence in mitigation or denial of damages. (*Walworth v. Pool*, vi English, 394.)

Finally, in a recent case, the Supreme Court of the United States have distinctly said that, while confining the damages to be awarded in such a matter as the present to *actual* damages, the rule admits to be sure of the consideration of profits, but which they define to be nothing but the difference between the cost to the plaintiff of doing the work, and the price which the defendant had agreed to pay for it. They add that “actual damages” means the direct and real loss of the plaintiff *propter rem non habitam*. (*Philadelphia and Baltimore Railroad Co. v. Howard*, xiii How. 308-344.)

It would be quite superfluous to multiply authorities on this point. The doctrine is well settled, and must be taken by me as the rule of law applicable to the subject-matter.

In addition, however, to all these authorities upon the nature and amount of the compensation due to a party, who has, in part, performed a contract of service, and offers to continue to perform, but is prevented by the other party, there is another class of decisive considerations.

Suppose the United States subject to action in this case, at the suit of Strader & Johnson, what would the form of action be?

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Clearly not *debt*, for debt lies only where the sum sued for is fixed, as the penalty of a bond, or may be fixed by mere computation. It is not sustainable when the demand is for unliquidated damages. (i Chitty on Pleading, 108, 109, 113, Stephens' N. P. tit. Debt, p. 1179.)

Cases occur, it is true, where *debt* has been sustained on a *quantum meruit* or *quantum valebat*; but, it is believed, that in all of them, so far as they have any bearing on the present question, the *quantum meruit* or the *quantum valebat* was on services rendered or goods delivered, where nothing but computation was needed to determine the amount to be recovered. (See Van Deusen v. Blum, xviii Pickering, 229.)

But it is otherwise when the claim is founded on a contract broken by the refusal to receive goods or services tendered, according to contract.

This very point was adjudged by the Court of King's Bench, in the case of *Green v. Bicknell*. The case was of refusal by the vendee to accept, according to contract, a cargo of oil. The court ruled that this was not a debt, but damages; that a settlement must be made and an account stated by agreement of the parties before the case could be treated as debt; that if anything can be denied or disputed, so as to be the subject of finding by a jury, it is not debt. (*Green v. Bicknell*, viii Ad. & El. 701; S. C. iii Nev. & Per. 634; see also *Ex parte Hecclings*, iii Mont. & Ayr. 147; *Ex parte Snape*, i Mont. & Chit. 607.)

The remedy of the party, in the present case, would be *covenant broken*, not *debt*:—it is not a question of account or debt, but of unliquidated damages as for tort.

Consequently, the question before me is this: Suppose that it is alleged by a party that a contract has been broken by the Post Office Department, by mail service being taken away from him without his consent, he being ready to perform; and suppose the party to claim compensation for the part unperformed as performed, which claim, as we have already seen, is really a claim of damages, for breach of contract sounding in tort, or it is nothing. Is the claim so preferred an account to be

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audited by the Auditor, and subject as an account to the final revision of the First Comptroller?

The act of July 2d, 1836, (v Stat. at Large, p. 80,) enacts that "there shall be appointed by the President, with the consent of the Senate, an Auditor of the Treasury for the Post Office Department, whose duty it shall be to receive all accounts arising in the Department, or relative thereto, to audit and settle the same, and certify the balance to the Postmaster General: Provided, that if either the Postmaster General, or any person whose account shall be settled, be dissatisfied therewith, he may, within twelve months, appeal to the First Comptroller of the Treasury, whose decision shall be final and conclusive." (Sec. 8.)

Now, in making this provision, did Congress intend that the Auditor should have power to entertain claims of damages for the violation of contracts, and that the First Comptroller shall, on appeal, have the "final and conclusive" jurisdiction of all possible future questions of such damages to arise in the business of the Post Office Department?

If so, it is a power vast in itself, of very large action on the public finances, to be placed in the hands of the mere accounting officers of the Treasury. If such power and jurisdiction over questions of damages is vested in the Auditor and Comptroller, it must be in virtue of some very imperative and very explicit manifestation of the will of Congress.

But, as it happens, there is no such explicitness of legislation here. The supposed authority for the final adjudication of the question of the question of damages, if conferred at all, is by force of the phrase "accounts arising in the Department." The substantive question, therefore, is, of the signification of the word "accounts."

The word account is of well understood meaning, whether in ordinary use or in the law.

Account is, primarily, reckoning or computation, and secondarily, the thing reckoned or computed, or a statement of the parts or the results of reckoning or computation.

An action of *account* is brought to recover a balance against

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a person chargeable as bailiff or receiver, or by one partner against another, and the first judgment is *quod computet*, that a computation be made or account stated. (Viner's Abridg., sub voc.; Bacon's Abr., sub voc.)

An *account rendered* is a statement of receipts and expenditures by an executor, trustee, or bailiff, or by merchants having dealings together.

An *account stated* is the settlement of dealings of debt and credit between parties, and an ascertainment of the balance.

Account of sales is the statement between merchants, or between principal and factor, of the sale or purchase of merchandise, and of commissions or other charges on the transaction.

A declaration in *assumpsit on account stated* is to recover the balance alleged to have been ascertained by previous mutual computation of the parties.

In all these forms and uses of the term, there is exclusion of the idea of damages, the amount of which is not the result of computation merely, but involves other considerations, and especially the determination of indemnity for breach of contract, sounding in tort, and depending on various premises of law and fact.

As a term of administrative law, *public accounts* implies mere statement and computation, not liquidation of damages on tort. (See statutes in Tomlin's Dic. sub voc.)

Similar conclusions may be deduced from the word *auditor*, in its various applications.

An *auditor* is he who *audits*, and is defined to be a person appointed or authorized to examine an account, compare the charges with the vouchers, hear the parties, allow or reject charges, and state the balance.

To *audit* is to examine and adjust an account.

There is indissoluble connection between *account* and *auditor*, the functions of the one indicating the nature of the other. Yet, no definition of the terms *audit* and *auditor* implies the adjudication of damages, or other determination of controversy.

A court of equity appoints an auditor "to examine and digest accounts." (Per Marshall, Ch. J., in *Field v. Holland*, vi Cranch,

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p. 8 and 21; see also *Lyman v. Warren*, xii Mass. R. 412; *Read v. Barlow*, i Aiken, 145.)

In all the multitude of cases at common law or in equity, in which *account* comes up, it is believed that the word will be found to have the limited force and meaning here ascribed to it. (Story's Equity Jurisprud. ch. viii; Stephens' *Nisi Prius*, vol. i, tit. Account.)

It would be an unheard-of thing for an auditor, appointed to audit an account, to enter into a question of unliquidated damages for breach of contract.

If, in addition to this, it should be contended that such auditor had final and conclusive jurisdiction of the claim of damages, the exorbitance of the assumed authority would aggravate the strangeness of the general proposition.

We perceive, then, that all the ordinary uses, legal or other, of the word "account," contradict the idea that this word, in the act under consideration, can carry with it the power supposed.

If other acts of Congress, and the exposition of them, be considered, it will be found that all the analogies of our administrative law are opposed to the assumption of any such power being vested in the Auditor and Comptroller.

By the act establishing the office of "Comptroller," he is authorized and required (in so far as regards the present question) "to superintend the adjustment and preservation of the public accounts," and "to examine all accounts settled by the Auditor." (i Stat. at Large, p. 66.)

At a later period, when the number of the accounting officers of the Treasury was increased, it was made the duty of the "First Comptroller to examine all accounts settled by the First and Fifth Auditors, and certify the balance arising thereon to the Register." (iii Stat. at Large, p. 367.)

So of Auditors, the act establishing this office, makes it the duty of an Auditor "to receive all public accounts, and after examination, to certify the balance, and transmit the accounts, with the vouchers and certificate, to the Comptroller, for his decision thereon." (i Stat. at Large, p. 67.)

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In the language of these statutes, also, the act of the Auditor or Comptroller is characterized as *adjustment*; but it is always an account which is "adjusted."

That is to say, the authority of the Auditor is confined to "accounts;" he receives and audits the accounts, and his auditing is supervised or *controlled* by the Comptroller.

Of course, all which has been said as to the authority of the Auditor under the act of 1836, applies to the question of the authority of the Comptroller.

Now, as to the construction of the other acts, there is pertinent authority in the opinions of my predecessors.

In one case, Mr. Attorney General Grundy seems to have thought that if any appropriation existed applicable to an object of damages, it could be awarded by a Head of Department. (Opinion, March 20th, 1839, ed. 1851, p. 1284.)

But, as to the accounting officers of the Treasury, in the case of John S. Stiles, Mr. Attorney General Taney says:

"If the Navy Commissioners have refused to take the bread from Mr. Stiles, according to contract, when he had prepared it of the quality called for by the agreement, it is not in the power of the executive branch of the Government to liquidate and pay the damages he may have sustained. If he has been damnified by the officers of the Government, Congress alone can redress the injury," (Opinions, ed. 1841, p. 882, July 2d, 1832.)

To the same effect is Mr. Attorney General Nelson's opinion, in regard to a claim of Bent, St. Vrain & Co., for damages on a contract, where he says: "I am quite clear that the accounting officers of the Treasury have no authority to adjust the claims of said contractors for damages, without the special authority of an act of Congress." (Opinions, Ante, vol. iv, p. 327, May 29th, 1844.)

These conclusions are confirmed by the tenor of many acts of Congress, giving special authority for the allowance of damages on contracts varied or not performed by the United States.

I begin with the twenty-fifth Congress, so that the examples

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given may be distinctly applicable to the Post Office Department, as its business is now transacted.

In the following cases, the Postmaster General is authorized to settle with parties on principles of equity and justice, namely, Hard and another, by act of May 21st, 1838, (vi Stat. at Large, p. 716;) Voorhies, by resolution of March 3d, 1843, (vi Stat. at Large, p. 907;) Shaw and another, by resolution of June 26th, 1848, (ix Stat. at Large, p. 747.)

The Postmaster General is authorized to make allowance to parties on contracts varied, suspended, or abrogated, in the following cases, namely: To Jefferson, by resolution of May 31st, 1844, (vi Stat. at Large, p. 932;) to McNair, by act of March 3d, 1845, (vi Stat. at Large, p. 938;) to Leavenworth, by resolution of August 6th, 1846, (ix Stat. at Large, p. 681;) to Stokes, by resolution of March 3d, 1847, (ix Stat. at Large, p. 708;) to Stokes, by act of August 14th, 1848, (ix Stat. at Large, p. 740.)

Similar power to determine damages under contracts is given to other Heads of Departments, by the following acts, namely; To the Secretary of War, by act of June 7th, 1838, (vi Stat. at Large, p. 718;) to the Secretary of War, by act of August 10th, 1846, (ix Stat. at Large, p. 678;) to the Secretary of the Treasury, by act of February 1st, 1849, (ix Stat. at Large, p. 757;) to the Secretary of the Treasury, by act June 25th, 1853, (Session Acts, Private, p. 21.)

Whether it be desirable or not that some permanent tribunal should exist, such as the accounting officers of the Treasury, or any other officers to be specially appointed for the purpose, to examine and determine all claims against the Government, including unliquidated demands for damages, is a question for Congress to determine. It suffices for the present inquiry to say that, so far, although in special cases it has occasionally referred such matters to the officers of the Treasury, yet it has not, by general law, given jurisdiction of claims of this class, arising in the Post Office, or any other of the Executive Departments.

In view of the general arguments herein adduced, and of the views of my predecessors, confirmatory thereof, my opinion

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is, that the claim of Strader & Johnson, in this case, is not an account within the meaning of the act of Congress.

I am, very respectfully,

C. CUSHING.

Hon. JAMES CAMPBELL,
Postmaster General.

NAVY AGENT'S CLERKS.

The clerks in the office of the Navy Agent at Washington are not embraced by the provisions of the act of April 22, 1854, which augments the salaries of certain clerks of the Executive Departments.

ATTORNEY GENERAL'S OFFICE,

June 8, 1854.

SIR: Your letter of the 4th ultimo submits the question whether the clerks in the office of the Navy Agent, at Washington, are entitled to increase of compensation under the act of Congress of April 22d, 1854.

The first section of this act provides, among other things, that, of the clerks authorized by the 3d section of the act of March 3d, 1853, the salary of the first class shall be increased from \$900 to \$1200; that of the second class from \$1200 to \$1400; and that of the third class from \$1400 to \$1600.

The first section further enacts, that all clerks not provided for in the act, performing the same or similar duties with any one of the classes, shall receive the same compensation as is allowed to said class.

The second section provides, among other things, that "an addition of 20 per cent. is hereby added to the pay now authorized by law," a great number of enumerated employees in the executive offices at the seat of government, including "the clerks employed at the Navy Yard and Marine Barracks, at Washington."

The general tenor of all the sections of this act is to augment the compensation of the clerks and other employees in the

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executive offices, more especially those having by law at the time a salary not exceeding \$1400 per annum.

In examining this act in reference to the clerks in the Department of State, I have already had occasion to state that, in my opinion, they are included within the legal intendment of the language of the first section; for that section is not confined in terms to any one department, and after providing for the classed clerks of the Treasury, War, Navy, Interior, and Post Office, it proceeds to enact that "all clerks not provided for in this act, performing the same or similar duties with any one of the classes, shall receive the same compensation as is allowed to such class," which enactment seems to me to apply distinctly to certain of the clerks in the State Department.

But the clerks in the office of the Navy Agent are not classed, and they vary in salary so much as not to fall readily into the classes of the law, their salaries being \$1800, \$1400, \$1200, and \$600.

What is most material, however, is the consideration that the salaries of the clerks in the office of the Navy Agent are not prescribed by law. The Secretary of the Navy fixes their relative rate of compensation, and may change this if he will. They are of the number of clerks in many branches of the public service, whose salaries are not fixed by any law, and are measured by the wise discretion of their immediate superiors, or of the President. I cannot think that the clerks of this description are comprehended in the provision. To extend it to them would be to extend the purview of the section beyond its apparent purpose, which was designed, it seems to me, only to provide for the clerks of the Executive Departments, whose salaries are defined by Congress.

If the purview of this first section pass the Departments, then it has no limit of place whatever, and comprehends not only all the public establishments in the city of Washington, but as well the whole United States, which could not have been the intention of Congress.

It remains to inquire whether the clerks in the office of the Navy Agent are included in the second section of the act.

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It is suggested that they are embraced in the words of that section, "clerks employed *at* the Navy Yard." I think not. The word *at* is descriptive of place, not of duties or their nature. It does not suffice to say that the duties of the Navy Agent have reference in fact to the business of the Navy Yard, so long as, in point of fact, the office of the Navy Agent is not kept *at* the Navy Yard.

Apart from this, all the provisions of the second section are specific, and describe persons by express designation of duty, office, or place of employment, without mentioning the office of the Navy Agent. It contains no terms of general description, applicable to non-enumerated persons.

Besides which, one of the salaries in the office of the Navy Agent is \$1800; and the obvious general intention is only to provide an addition to the salaries of the clerks, receiving a less rate of compensation.

But the provision of the second section is for an addition of 20 per cent.; and if the section comprehends any of the clerks in the office of the Navy Agent, it includes all.

Moreover, the additional compensation provided for in this act is to be paid out of any money in the Treasury not otherwise appropriated. Now the salaries of the many clerks, whose salaries are not fixed by law, like those in the office of the Navy Agent, are chargeable to specific funds, appropriated by Congress to meet the expenses of the particular branches of public service in which such clerks are employed. Unless there be plain and unequivocal language in the act to lead to such conclusion, (which there is not,) it is not to be intended that Congress had any purpose to change its general policy in this respect. If, in the present act, it has done so, as is suggested, in a single case, that was probably from inadvertence.

In a word, I think that, in the second section, Congress enumerated all the persons it intended to provide for; and that to so construe the section as to make it embrace the clerks in the office of the Navy Agent would be to admit a multitude of persons, whom, if Congress designed to embrace, it would have said so, either in specific terms, or by terms of general inclu-

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sion, as in the first section concerning the Executive Departments.

I am, very respectfully,

C. CUSHING.

Hon. J. C. DOBBIN,

Secretary of the Navy.

DAMAGES UNDER THE FLORIDA TREATY.

The extraordinary expenses of a party incurred in living at St. Mary's, whither he retired after the destruction of his property in Florida, are a matter too remotely consequential to be the proper subject of damages under the 9th article of the treaty of 1819 between the United States and Spain.

ATTORNEY GENERAL'S OFFICE,

June 8, 1854.

SIR: On revision of the files of this office, a reference is found, made by the late Secretary of the Treasury, (Mr. Corwin,) under date of the 22d of February, 1853, on which I now proceed to report.

The reference is of certain questions arising in the case of Fatio, a claimant under the 9th article of the treaty between the United States and Spain of 1819, commonly called the Florida Treaty, which article is as follows, viz.:

"The United States will cause satisfaction to be made for the injuries, if any, which, by process of law, shall be established to have been suffered by the Spanish officers, and individual Spanish inhabitants, by the late operations of the American army in Florida."

And the case is referred by Mr. Corwin for the specific and sole purpose of answer to the following questions, namely:

"1. If the claimant, a Spanish inhabitant of Florida, was forced by the destruction of his dwelling in Florida, by the American troops in 1812, to retire from his plantation in Florida and remove with his family to St. Mary's, in Georgia, for safety, and was compelled there to incur, and did incur, the extraordinary expense of \$3750, as awarded by the judge for said expense, whether this is an injury for which the United States are

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bound, by the 9th article of the treaty of 1819, to make satisfaction, as decided by the judge, and reported by the Solicitor of the Treasury?"

"2. If so, whether the allowance of two-thirds of a crop in 1813, under the opinion of Attorney General Legare, ought to be considered as covering such extraordinary expenses?"

It does not appear, from the case stated, how these questions arise, nor what application is to be made of the answer to them, and, therefore they have, in some respects, the quality of abstract questions, which it is not profitable to answer. Besides which, it is always inconvenient to answer specific questions, made up, and separated from the general question of which they, in the ultimate decision, form a part. But we may conjecture that, in the present case, these questions were intended as means of aiding the Secretary to determine whether, in the exercise of the authority conferred on him by the act of March 3d, 1823, the decision of the judge is "just and equitable," so that he shall be required to pay the amount to the claimant *Fatio*.

Assuming this, and that the questions are therefore practical and actual ones, they are, of the true measure of damages under the Florida treaty.

Damages, resulting from an injury to be satisfied in money, are either direct, or consequential; and consequential damages may be certain or uncertain.

The direct damage to the Spanish inhabitants of Florida, caused by the operations of the American forces in Florida, was the value of the goods and chattels taken, burned, or destroyed; the value of houses, fences, and growing crops, burned, or otherwise destroyed or wasted, and the value of all waste committed upon the lands and tenements. The consequential damage was the deprivation of the use of the goods and chattels taken, and never restored, and of the rents, issues, and profits of the lands and tenements, during the time the Spanish inhabitants were deprived of them by circumstances and contingencies,—all which must be conjectural and very uncertain. So likewise as to the consequential damages resulting from the violent abduction of all other goods and chattels from the owner and never restored to him.

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It cannot be pretended that the object of the treaty was to subject the United States to vindictive damages. It only provides for such ordinary indemnification, in the case of property destroyed, as the municipal law and the public law alike agree in according to the party injured.

I take the rule of satisfaction and indemnity in such cases to be well settled by all the authorities, as being the value of the thing taken, excluding the contingent or possible inconveniences occasioned by the deprivation. (See *The Anna Maria*, ii Wheat. 327; *The Amiable Nancy*, iii Wheat. 560; *La Amistad de Rues*, v Wheat. 389; *The Apollon*, ix Wheat. 376; *The Acteon*, ii Dodson, 134; Sedgwick on Damages, p. 517, 549, 550.)

The difference between those direct and consequential damages certain, which are reasonable against a wrongdoer, and consequential damages remote, uncertain, and therefore not recoverable, is explained by (Henry Home) Lord Kaimes, (*Principles of Equity*, b. i, part i, sec. 5, p. 95 to 101,) and by Attorney General Legare in his opinion of 25th October, 1841, to the Secretary of the Treasury. (*Ante*, vol. 3, p. 679.)

From these rules for the adjudication of damages direct, and damages consequential, against tortfeasors, it is to be inferred that the consequential damages must be such as are so closely united with the trespass that the trespass may be known as the cause, and the damage as the effect clearly proceeding from the trespass and from no other cause; and withal it is necessary that the damage claimed be reduced to some reasonable and just standard of computation.

The style of Fatio's living in the State of Georgia, and the expenses there incurred in support of his family, are, in my opinion, circumstances too remote, and proceeding from other causes than the operations of the American army in Florida. Such expenses are totally foreign to those operations. They are speculative, and not measurable by any certain standard. They are more remotely and indistinctly related to the trespass of the American army in Florida, than expected and probable profits of a voyage are to the illegal capture of the vessel and

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cargo, by which the voyage is broken up, and the probable expectation of profits disappointed, which probable profits are not allowed to be taken into the account of damages, as seen in the adjudications before cited.

I reply, therefore, to the first question, that, in my opinion, the extraordinary expenses incurred by Fatio in the support of his family, at St. Mary's, whither he retired from Florida on the destruction of his house there, do not come within any proper and lawful rule applicable to the ascertainment of damages under the treaty for the cession of Florida.

Of course, in this view of the subject, any answer to the second question is wholly superfluous.

I am, very respectfully,

C. CUSHING.

Hon. JAMES GUTHRIE,
Secretary of the Treasury.

 CLAIMS UNDER THE FLORIDA TREATY.

In virtue of the acts of Congress, which provide for the execution of the 9th article of the treaty between the United States and Spain for the cession of Florida, which awards damages in certain cases to inhabitants of Florida, the Secretary of the Treasury has lawful authority to determine whether the awards of the judge of the District Court of Florida are "just and equitable" or not, and to allow or disallow the same accordingly, at his discretion.

The decision of preceding Secretaries of the Treasury that interest is not allowable on such claims is to be considered as *res adjudicata*, and binding on the present Secretary.

ATTORNEY GENERAL'S OFFICE,

June 9, 1854.

SIR: Your letter of the 4th of November last referred to me the case of Redin Blunt, a claim arising under the 9th article of the treaty of 1819, between the United States and Spain, commonly called the Florida Treaty, and the acts of Congress of the 3d March, 1823, (iii Stat. at Large, p. 768,) and of the 26th of June, 1834, (vi Stat. at Large, p. 569,) passed to carry said article into effect.

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The provision of the treaty in question is in the following words, namely :

“The United States will cause satisfaction to be made for the injuries, if any, which by process of law shall be established to have been suffered by the Spanish officers, and individual Spanish inhabitants, by the late operations of the American army in Florida.”—(viii Stat. at Large, p. 260.)

The act of 1823, in its material parts, runs as follows :

Sec. 1. “That the judges of the superior courts established at St. Augustine and Panzacola, in the territory of Florida, respectively, * * * are hereby authorized and directed to receive and adjust all claims, arising within their respective jurisdictions, of the inhabitants of said territory, or their representatives, agreeably to the 9th article of the treaty with Spain, by which the said territory was ceded to the United States.

Sec. 2. “That in all cases in which said judges shall decide in favor of the claimants, the decisions, with the evidence on which they are founded, shall be, by said judges, reported to the Secretary of the Treasury, who, on being satisfied that the same is just and equitable, within the provisions of the said treaty, shall pay the amount thereof to the person or persons in whose favor the same is adjudged, out of any money in the Treasury not otherwise appropriated.”

The act of 1834 was particularly intended to declare and to define the import of the word “late” in the previous act ; and, for the present purpose, it needs only to cite the following expressions from it, namely :

“That the Secretary of the Treasury * * * is authorized and directed to pay, out of any money in the Treasury not otherwise appropriated, the amount awarded by the judge for losses, &c., in all cases where the decision of the said judge shall be deemed by the Secretary of the Treasury to be just.”

On the admission of Florida into the Union as a State, it was provided, by the 6th section of the act of February 22, 1847, (ix Stat. at Large, p. 130,) “that any unfinished business or proceedings now remaining or pending before the judge of the Superior Court at St. Augustine, as a commissioner under and

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by virtue of the act of 1834, above quoted, or under any other act granting special powers, or imposing special duties upon said judge, * * * are hereby transferred to the judge of the District Court of the district of Florida;" and under this provision, the jurisdiction of the claims in question passed to the District Court.

Your letter to me, assuming the treaty provision and the legislative provisions, presented above in detail, then proceeds to recite the facts and the questions propounded by you thereon, as follows:

"The amount claimed under the award of the judge of the District Court of the United States, for the northern district of Florida, as the value of the property destroyed, is \$1670, and the amount claimed under the award as interest, at the rate of 5 per cent. per annum, (by way of damages,) from 10th May, 1813, to 26th June, 1835, is \$1847.42.

"The act of 3d March, 1823, directly, and the act of 26th June, 1834, by implication, provides that the amount, payable under the said treaty and acts, shall be paid out of any money in the Treasury not otherwise appropriated. The appropriations were indefinite in amount, and without express limitation of time, unless in those provisions of law which relate to the surplus fund, and claims of this description, presented at the Treasury, have, for a series of years past, been paid out of such indefinite appropriations without any estimate being laid before Congress of the amount, and without there being any presentation of the amount payable or chargeable to such appropriation from year to year. * * * * *

"You will also receive a list of other claims arising under the same article of the treaty and laws on which payments have been made, under the awards, * * * and on which the claimants now demand, as in the case of Blunt, the interest as decreed by the court, by way of damages, amounting in the aggregate, as it is supposed, to nearly one million of dollars.

"This latter part of these claims awarded by the judges, was first rejected by Mr. Secretary Woodbury, under the 'usage of the Treasury Department' in the case of the heirs of John Giampoly, the sum allowed as the value of the property in

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which was paid on the 5th June, 1837, as shown by the accompanying papers, and the decision thus made has continued to govern in these cases to the present time.

"The subject is now respectfully submitted to you for your opinion on the following points :

"1st. Whether the claim of Redin Blunt, and others of the same class, are just and equitable, within the provisions of the treaty, so far as the award is for the value of the property alleged to have been destroyed?"

"2d. Whether the interest awarded on said claims, by way of damages, was properly so awarded as part of the measure of satisfaction to which the claimants were entitled, and was payable on principles of law by the Secretary of the Treasury?"

"3d. Whether the decision of Mr. Secretary Woodbury, in refusing to pay interest, on the ground that its payment was not consistent with 'the usage of the Treasury Department,' is binding on his successors in office, in the particular case in which the decision was made, and should restrain the payment in other cases in which the value of the property has been paid for, and in the case of Redin Blunt, in which neither this value nor the interest has been paid?"

"4th. Whether, considering the spirit of our institutions, and the relations of the Executive Department to the Legislative, it would be consistent with a just public policy for this Department to pay this class of claims, and to such amount, without any further action on the part of Congress, or other authority than the appropriations in 1823 and 1834, as before stated, and without the amount being submitted as an estimate, or reported as a contingent charge, depending upon such appropriation, on the Treasury?"

The general matter thus submitted is of great magnitude in regard to the amount of claim involved, and still more in the nature of the legal questions upon which it depends, of the true construction of the 9th article of the Florida treaty, the character of the special functions with which the judge of the District Court is invested under the acts of Congress, the inquiry whether interest on these claims, withheld for twenty years by

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successive Secretaries of the Treasury, shall now be allowed, and the character and extent of the duty and power of the Secretary of the Treasury in the premises.

All these questions have been argued before me by eminent counsel, and with great ability, backed by the opinions of learned jurists, in denial of the power heretofore exercised in the premises by the Secretaries of the Treasury, from the year 1823 to the present time, and in denial of the legality and justice of the grounds of decision on which they have uniformly acted as to the claim of interest, ever since it was first distinctly presented by the judge of Florida, and then determined by Secretary Woodbury.

All these facts, and the considerations pertinent to them, have prevented my completing, to my own satisfaction, the examination of the subject while otherwise more or less occupied in the current business of the office during the late sittings of the Supreme Court.

I now proceed to state the conclusions to which my mind has arrived.

The first question proposed is divisible into two parts :

1. Whether the claim of Redin Blunt is just and equitable within the treaty, so far as the award is for the value of the property alleged to have been destroyed.

2. Whether others of the same class are just and equitable to the above extent.

It does not distinctly appear what other cases the question refers to. Only one accompanies the reference, that of Francis Pass.

I have not scrutinized either of these cases very carefully, for the reason that, in my view of the subject, my own opinion, on the point whether the decisions reported in them are just and equitable, is wholly immaterial, and can have no legal relation to the subject, which is by the statute a question for the sole conscience and judgment of the Secretary of the Treasury.

The second question presented by you is, Whether the interest, awarded by the judge in the case of Redin Blunt, by way of damages, was properly so awarded, and payable on the principles of law by the Secretary of the Treasury ?

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The third question is divisible into parts—

1. Whether the decision of Secretary Woodbury, in refusing to pay interest on the ground of past usage, is binding on his successors in the particular case in which the decision was made?

2. Whether that decision should restrain the payment of interest in the other cases, in which the value of the property has already been paid for?

3. Whether it should govern in the present case of Redin Blunt, which now comes up as a question entire of both principal and interest?

After thus analyzing the third question, permit me to say that it seems to me to narrow the inquiry too much for its necessary merits.

The validity or invalidity of the decision of Secretary Woodbury does not depend on the sufficiency of the reason he assigned for it; and the sufficiency to himself of the reason he gave depends, of course, not on the language in which he expressed it, but on the consideration whether any legal weight in his mind was due or not to the general practice of the Government then and now, not to pay interest in the ordinary course of transactions liquidated by the accounting officers of the Treasury.

And the broad inquiry suggested by this part of the subject seems to me to be,—What is the legal effect, in regard to the judgment of the present Secretary of the Treasury, of the action in the premises of the whole series of his predecessors, all of whom concurred as to the construction of their powers under the acts of Congress, and none of whom have allowed interest since the point offered itself for decision upon the report of the judge in Florida?

Having thus enlarged the third question to the limits of its probable intention, and of the real inquiry, we may now, in what follows, treat that question and the second one together in one continuous view.

It is most earnestly argued by the counsel for the claimants—

1. That the phrase in the treaty as to claims “which by

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process of law shall be established," imports a purely *judicial* process from the beginning to the end, and that, therefore, the decision of the judge of the Territory or district, upon the merits of each claim and its amount, is final and conclusive by the force of the treaty.

2. That, when the acts of 1823 and 1834 authorize the Secretary of the Treasury to pay a claim according to the judge's decision, on his being "satisfied that the same is just and equitable," or if he shall deem it to be "just,"—if by these phrases Congress intended to confer on the Secretary of the Treasury power to supervise the decision of the judge on its merits, or to reject any part of his award,—then the acts in question were so far forth in violation of the treaty, and therefore null; and that they are also unconstitutional as an exercise of judicial power by the Secretary of the Treasury.

3. That interest, on all such injuries as those which are provided for by the treaty, is a lawful part of the damages by the law of nations, the municipal law, and the proper construction of the acts of Congress.

4. That the whole series of decisions of past Secretaries on the subject of interest were an illegal abuse of authority; that the decisions were against law in themselves, and ought now to be reconsidered and reversed by the present Secretary.

5. That of course the Secretary, looking only to see whether the present award is an authentic one, and from a judge having jurisdiction, should accept and pay, without challenge, the whole award in favor of Redin Blunt.

Now, on proceeding to consider these questions, at the very outset of my progress, and whilst feeling about for a standpoint from which to grapple with them, there came to my hands, among the voluminous papers which have been accumulating in the case for years, an elaborate official opinion of my immediate predecessor, (Mr. Crittenden,) addressed to Mr. Graham, as Acting Secretary of the Treasury, under date of April 16, 1851, upon a reference of this very claim of Redin Blunt, and all the general questions which that claim is made to support. That opinion is very carefully drawn; it is thorough, complete;

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and full, and it covers the whole breadth and length of all the questions now presented to me for determination.

Mr. Crittenden comes to the conclusion that it was the intention of the acts of Congress to confer on the Secretary of the Treasury a supervisory power over the award of the judges ;

That the provisions of the acts of Congress in this respect are constitutional and valid ;

That, if it were otherwise, yet the whole power of the Secretary to pay the amount of an award is dependent on the prerequisite of such supervision, and that if he cannot supervise he cannot pay ;

That although, if the question were a new one, the weight of legal authorities would induce the conclusion that satisfaction or indemnification for property illegally taken or destroyed includes not only its value, but interest upon that value, as an equivalent for the loss of use of that property, yet that the long series of uniform decisions to the contrary in this particular class of cases has the effect and force of law, and is obligatory on the Secretary of the Treasury. (See ante, vol. v, p. 333.)

Ten years before, (June 17, 1841,) the same general question had been referred to Mr. Crittenden, and he had then expressed the opinion that the Secretary of the Treasury may lawfully examine into all the facts and circumstances, which constitute the grounds upon which a judgment for losses has been rendered, and determine whether, upon the whole case, the decision of the judges be just and equitable ;

That the United States have never agreed to be concluded in these cases by the award of the judge, but have deliberately reserved a supervisory power in the Secretary of the Treasury ;

That Congress has reserved to itself the power to decide whether interest shall be allowed in such cases, and that without the authority of Congress it cannot be paid by the Secretary of the Treasury. (Ante, vol. iv, p. 635.)

Soon afterwards, upon a reference of one of these cases to Mr. Legare by the Secretary of the Treasury, Mr. Forward, that officer said :

“ It is the plain meaning of the two acts, that the Secretary

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of the Treasury is to pay the claims on which a favorable report may have been made by the judge * * * only in cases where, upon an examination by the Department of such decision, as well as of the evidence on which it is founded, that decision shall be deemed by the Secretary of the Treasury to be just. In other words, Congress meant to bind itself, by the reference to judicial examination, only so far as the head of the Treasury Department should be satisfied with its results. The examination of the judge is to enlighten the mind of the Secretary, just as the verdict of a jury in a feigned issue is to enlighten the conscience of the chancellor, and in both cases with precisely the same freedom on the part of him whose decree is to be final, to follow, after all, his own sense of what belongs to the real equity of the case." (Ante, vol. iv, p. 677.)

Finally, the same questions were considered by Mr. Nelson, on a reference to him by the Secretary of the Treasury, (Mr. Spencer,) and he ruled—

That the acts of Congress confer on the Secretary a lawful authority in these cases to supervise, review, and revise the decision of the judge;

That the only power of the Secretary over the appropriations made by the acts of 1823 and 1834 is a conditional one, being coupled with the restrictive proviso that he shall be satisfied that the decision of the judge is just and equitable, and unless he be so satisfied, then he cannot draw on the appropriation;

That the uniform construction of the act of 1823, to refuse the allowance of interest, that construction being tacitly confirmed by Congress in the act of 1834, is now to be considered as settled law obligatory on the Secretary. (Ante, vol. v, p. 286.)

On thus reviewing the past discussions of these cases, the conviction is forced on me that there is not, in the history of the Government, a stronger and clearer case than this of *res judicata*, both as opinion and as action. If four concurrent opinions of Attorneys General, at different times, without any contradictory or dissentient opinion, and the unvarying action of successive Secretaries of the Treasury for twenty years, either affirmatively in expressly refusing, or negatively in not allowing,

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interest, do not constitute a decision of the question of the official duty of the Secretary of the Treasury in the premises, then, it is not easy to see how there is to be any decision of a matter of law involved in the action of the Executive Departments.

I am aware that the doctrine *stare decisis* has been somewhat capriciously dealt with by courts of law, who sometimes stand by past decisions, where many considerations require their reversal, and sometimes reverse them in the face of much greater obstacles, according to the impulse of the case, or the personal qualities of the court.

Undoubtedly a judge, an attorney general, a secretary has the strict legal right to overrule himself, or his predecessor, when convinced that the former opinion was wrong; and examples are not rare of this having been done to the public advantage, in pursuance of the maxim: "*Gaudent sapientes errores corrigere, fatui nunquam.*"

At the same time the business of a judge is to pronounce the existing law in a case, not to make new law for it; *jus dare*, not *jus facere*. And, in our jurisprudence, judicial decisions and expositions are themselves the law. The review and reversal of past decisions not only unsettles the law as a fabric, but it unsettles the very foundations on which the fabric stands, which is the acquiescence of men's minds in a thing decided as affording a rule of law for the subject-matter.

Still, contingencies do arise in which the new views of doctrine or fact, which time brings with it, or the fresh minds applied to the consideration of the subject, lead to new conclusions on a question, and conclusions contradictory of the past, and thus present the question of the propriety of innovating on past adjudications. If, in a case arising which involves the application of an established rule, the judge has reason to think that the rule is an erroneous one, wrongfully decided originally, and that its continued application works irreparable injury in the given case, in that contingency he has to determine the preliminary question of conflicting obligations, the decision of which is to guide him in the discharge of his duty, namely, whether, in the balance of legal good and evil, he ought to leave

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the established law undisturbed, or to disturb it in order to repair a possible past error.

If, on consideration of the whole subject, my duty should appear to require me to overrule a past decision, of course it would be done, even at the risk, as in the present case, of incurring the imputation of presumptuous disregard of a long line of concordant decisions and authorities.

But, after the most careful reflection upon the subject, it does not appear to me that any exigency of duty requires me to undertake to review the established construction of law applicable to the subject. On the contrary, other relations of the matter exist, which furnish, as it seems to me, a plain rule of duty incompatible with my doing this.

The treaty stipulates that the United States will cause satisfaction to be made for the injuries, if any, which, by process of law, shall be established to have been suffered. It leaves to Congress the duty in this case, as in every other of a treaty requiring legislation for its execution, of providing the legislative means to attain the object.

In the present case Congress had two things to do:—one to provide the means of ascertaining how much and to whom the indemnity should be paid; and, secondly, to appropriate money and give authority for the payment. It has done this by the acts of 1823 and 1834, which prescribe the “process of law” by which the claims are to be established, and appropriate conditionally the money for their satisfaction. Without these acts the Secretary of the Treasury has no appropriation to draw upon for the payment of these claims. The plain tenor of the law is that he may pay for a loss within the treaty, on prescribed conditions; those conditions are that a certain “judge” or “commissioner,” as he is denominated in one of the acts, shall have examined the alleged loss, and decided in favor of the claimant; that his decision, with the evidence on which it was founded, shall be reported to the Secretary of the Treasury; and the latter is thereupon, with the evidence before him, to consider and determine whether, in his own conscientious judgment, the decision reported was “just and equitable.” If he be satisfied of

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this, but not otherwise, he may pay the claim out of the standing appropriation provided by the acts.

The law does not say the Secretary shall, on receiving the report of the judge, inquire whether the judge had jurisdiction, and, on being satisfied of that, treat the decision as final and conclusive, and pay accordingly; but the evidence is to be reported to him, and he is to determine, by inspection of that, whether the decision was just and equitable. It is impossible for me to doubt that such is the tenor of the acts, and the explicit intention of Congress.

But it is said such an enactment is in violation of the treaty; that "process of law" means a judicial proceeding; that the action of the judge is judicial, and excludes all other action; that no scrap of judicial authority can constitutionally be vested in the Secretary of the Treasury.

I reply, first, that the successive legal advisers of the Government have decided that the law is constitutional and proper; that every Secretary of the Treasury, from Mr. Rush down, has exercised the authority; that in passing the act of 1834 Congress expressly reaffirmed in this respect what it had previously done in 1823; that the claimants have accepted the jurisdiction of the Secretaries as construed by them; and that twenty or thirty years of construction thus accepted have given it as complete sanction as it is possible for any law to have.

I reply further, if it be still urged that the provision, notwithstanding it has the sanction of twenty years' acceptance and approbation, is unconstitutional, and therefore of no force, then it is for Congress to provide the remedy. It is manifest that Congress did not intend to have the decision of the judge final; it did not intend that the money should be paid on his simple certificate; it did not intend to open the Treasury to the mere fiat of a subordinate court, exempt from appeal; it did not intend to impose upon the Secretary the bare ministerial duty of countersigning whatever the judge might report. If the jurisdiction thus created be unlawful and improper, it does not follow that the Secretary of the Treasury or the Attorney General is, by construction, to break down all the safeguards with which Congress endeavored to surround the subject, and

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thus leave it without any. It is our duty in such a case to say, not that the decision of the judge alone, contrary to the indubitable purpose of Congress, is final, but that, if the parties be not satisfied with the mode of supervision which the act provides, then their claims must remain unsatisfied until Congress shall see fit to interpose and enact other means of executing the treaty. In a word, the party must either accept that supervision of the Secretary, without which the money to pay his claim cannot be drawn from the Treasury, or else he must go to Congress for relief.

On the other hand, if the parties utterly deny the jurisdiction of the Secretary of the Treasury to supervise the decision of the judge, it is quite superfluous for him to discuss with them the rules of law by which, if he have jurisdiction, he shall be guided to that condition of mental satisfaction with the justice and equity of the claim, which the law supposes and requires him to attain before he can have power to draw on the appropriation to make payment. If he cannot judge at all, it is idle for him to consider how to judge.

But there is beyond all this a higher and more important consideration, which seems to me conclusive of the true course to be pursued. In the matter of these claims, and the manner, as well as the rule, of determining the amount to be paid on them, there is a body of adjudication, such as can be found in scarce any other class of administrative questions on record. We are asked to review, overrule, and reverse all this for alleged errors in the construction of the law.

I think the true answer to this, and to every such application, is, that where a long course of decision has thus come to be the established law of the executive departments, a new Secretary has no just discretion to unsettle all that his predecessors have done in the settlement of a class of accounts under given acts of Congress. If our Government were absolute in fact,—if the Executive were the maker of the law as well as its executor,—if it were the function of the Secretary of the Treasury to raise the money, and appropriate as well as expend it,—if the President were the State,—then it might answer for the Secretary of to-day, upon his new impressions of the law, to allow to claim-

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ants millions of arrears on accounts wholly disposed of ten or twenty years ago by the Secretary in office at that time. But such a course seems to me wholly incompatible with our institutions; for the errors, if errors there be, in the acts of any former officers of the Treasury are reparable by constitutional means, namely, an appeal to Congress. The jurisdiction of the matter in every such case rightfully belongs to that branch of the Government. Although, in the present case, the Secretary can disregard the rightful jurisdiction of that body over the question, and go back to revise the action of all his predecessors in the premises, because the standing appropriation here enables him to do it, still in so doing he would not exercise that wise and lawful discretion, which Congress expected of him when it conferred the power. It is beyond all peradventure that he ought to disburse this money as discreetly as if he were under the necessity of presenting annual estimates of the same to Congress.

While, for all these reasons, it would be unwise, in my opinion, for the Secretary of the Treasury to re-open of himself questions so fully and so long adjudicated all in one way, and especially after the ample discussion of it in the last opinion of Mr. Crittenden, it is due to explicitness to say that his view of the interest question precisely accords with my own, to the effect that, although, if the question of interest were a new one, the weight of legal authority might possibly lead to a different result from the existing one, yet the received rule must now be regarded as the law, subject only to the judgment of the Congress, which can, if it will, do what it has not yet done, prescribe by law the conditions and circumstances under which interest shall be allowed by the officers of the Treasury.

As to the other points involved, that the conclusions of my predecessors have my own cordial assent, it seems hardly necessary for me to say, after they have been adopted and confirmed by a recent decision of the Supreme Court.

The case of the *United States v. Ferreira*, (xiii Howard, p. 40,) was of a claim under the ninth article of the Florida Treaty, appealed from the district judge for the purpose of testing the question of his power, and that of the Secretary. The

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Chief Justice elaborately reviews the whole subject, and the conclusion of the court will be well understood from the following extracts :

“The treaty certainly created no tribunal by which these damages were to be adjusted, and gives no authority to any court of justice to inquire into or adjust the amount which the United States were to pay to the respective parties who had suffered damage from the causes mentioned in the treaty. It rested with Congress to provide one, according to the treaty stipulation. But when that tribunal was appointed it derived its whole authority from the law creating it, and not from the treaty, and Congress had a right to regulate its proceedings and limit its power, and to subject its decisions to the control of an appellate tribunal, if it deemed it advisable to do so.” * * *

“It is too evident for argument upon the subject, that such a tribunal is not a judicial one, and that the act of Congress did not intend to make it one. The authority conferred on the respective judges was nothing more than that of a commissioner to adjust certain claims against the United States, and the office of judge and their respective jurisdictions are referred to in the law, merely as a designation of the persons to whom the authority is confided, and the territorial limits to which it extends. The decision is not the judgment of a court of justice. It is the award of a commissioner.” * * *

“Nor can we see any ground for objection to the power of revision and control given to the Secretary of the Treasury. When the United States consent to submit the adjustment of claims against them to any tribunal, they have a right to prescribe the conditions on which they will pay. And they had a right, therefore, to make the approval of the award by the Secretary of the Treasury one of the conditions upon which they would agree to be liable. No claim, therefore, is due from the United States, until it is sanctioned by him, and his decision against the claimant, for the whole or a part of a claim as allowed by the judge, is final and conclusive. It cannot afterwards be disturbed by an appeal to this or any other court, or in any other way without the authority of an act of Congress.”

I am, therefore, prepared to say, in answer to your last ques-

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tion, that in my judgment, it suggests the true solution of the whole question; and that "considering the spirit of our institutions, and the relation of the executive department to the legislative," it would not be "consistent with a just public policy," to revise the grounds of decision of your predecessors, or to change them in a new case so as to act retrospectively on the past, "without further action on the part of Congress."

There is a special reason now to be stated, which precludes all doubt in my mind on this point

The opinion of Mr. Nelson, referred to above, was rendered upon the claim of Zephaniah Kingsley, sustaining the jurisdiction of the Secretary, and disposing of the question of interest as a thing no longer open for discussion.

Thereafter Kingsley applied to Congress for relief, and his petition was considered, and in consequence thereof, upon report by Mr. Ashley, the following resolution was adopted on the 3d of August, 1846, namely:

"*Resolved*, That the petition of Kingsley B. Gibbs, executor of Zephaniah Kingsley, deceased, and the accompanying documents, be referred to the Secretary of the Treasury, and the Attorney General of the United States, to report thereon to the Senate, the first day of the next session of Congress." (Senate Journal, 1st sess., 29th Con., p. 471.)

That this resolution was intended as a preparatory disposition of the whole question of interest on these claims, is proved by the following extract from a report to the Senate, by Mr. Westcott, the year following, the 3d of March, 1847, namely:

"It has been urged upon the committee, that inasmuch as these claimants have been denied payment of their claims, for almost a third of a century since the injuries were inflicted, and upwards of twenty-five years since the treaty was finally ratified, though the justice of them has been several times admitted by reports of committees of one or the other house of Congress, that an allowance by way of interest, or increased indemnity, should be made to them.

"Whatever may be assumed to be the merits of these cases, as going to exempt them from the operation of the general rule,

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that the United States do not pay interest, inasmuch as this question of interest on all the claims, (of 1812 and 1813—and 1818,) heretofore allowed, has been made a subject of special memorial to Congress at last session, and referred by the Senate to the Attorney General, and Secretary of the Treasury, for their report to Congress, it is deemed proper to defer any definite action as to the interest claimed in these cases, till such report is made, and till the question as to its allowance in the other cases is brought forward for decision." (Senate Documents, 2d Sess., 29th Congress, Vol. iii, No. 222, p. 18.)

It is a material fact corroborative of the conclusions herein stated, that, on two occasions, since the reference made by Mr. Ashley's resolution, Congress has in effect sanctioned the past action of the Treasury Department in these cases.

By the private act of March 3d, 1849, it is enacted that the claims of Andrew Capella, John Cape, John Beardon, and Francis Pass, arising under the Florida treaty, may be adjudicated to final settlement, pursuant to the acts of 1823 and 1834, provided the parties show good cause for not having presented their claims within the time prescribed by the latter act. Thus it is that the case of Francis Pass, through his administrator Ferreira, comes before the Department, and also before the Supreme Court. (ix Stat. at Large, p. 788.)

By another private act of the 20th of January, 1853, similar provision is made in behalf of Joseph Arnow. (Session Acts, p. 20.)

Now, in each of these acts, it is declared that the said claims are to be "settled by the Treasury as are other cases under the said act:" that is to say, Congress, with full knowledge of the action of the Secretary of the Treasury in the premises, impliedly recognises and affirms it.

It does not appear that the report, which Congress called on the Secretary of the Treasury and the Attorney General to make in these cases, has yet been made. Congress became, so to speak, seised of the subject, and is waiting for information upon which to act. It matters not that the call was made eight years ago. The question has been pending all that time, until it has grown up into the mountain of memorials, opinions of

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counsel, and other documents now before me. I do not think it would be constitutionally proper, or consistent with public policy, when this vexed question has been referred to Congress, and while Congress waits for information from the Secretary of the Treasury and the Attorney General to aid its deliberations in the matter, that we, or either of us, should undertake to revise and overrule the established construction of the acts under examination, and thus irregularly anticipate and foreclose the decision of Congress.

It would be mere dereliction of duty, and open violation of law, for the Secretary to pay any of these claims, on the judge's report, unless he be satisfied that they are just and equitable. The law interposes this condition. It prescribes and exacts a review of the merits of the judge's decision. If the Secretary doubts whether that supervision and review, as the law commands them, are properly intrusted to him, it does not follow that he shall pay the claims without supervision. That would be to defeat the express injunction of the law. Instead of this, if there be any reasonable doubt as to his authority in the premises, that doubt should be communicated to Congress, in order to have it determined by that body, whether the same supervision shall continue to exist, or some substitute authority be provided to exercise the supervision. No other course seems to me to be compatible with any possible construction of the acts of Congress.

In my judgment, also, it would be a violent and reprehensible stretch of executive authority for the Secretary of the Treasury, in the circumstances of the present case, when Congress, by the act of 1823, imposed on him a duty of supervision for the security of the public treasure against the possible errors of the territorial and district judge,—when, by the act of 1834, Congress reiterated the command of supervision,—when all his predecessors have exercised this authority for thirty years, and for nearly twenty years without challenge,—when for all that period the parties acquiesced in the exercise of such authority,—when the rightfulness of the authority, and the rule of decision by which its exercise has been governed, have been deliberately affirmed by the unconflicting opinions of all the Attorneys

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General, to whom the consideration of the question had been referred,—when the Supreme Court of the United States has emphatically affirmed it,—when Congress, being at length notified of the question, has taken charge of it and is waiting for information from the Secretary, as preliminary to a determination of the question by itself,—in such circumstances, it would, it seems to me, be a flagrant usurpation of power for the Secretary to review, overrule, and reverse the decisions of all his predecessors, and to make a new rule of payment, without exercising that supervision in the premises which is positively commanded by the acts of Congress.

I recommend, therefore, that the matter be now laid before Congress, in the form required by the resolution of the Senate.

I am, very respectfully, your obedient servant,

C. CUSHING.

HON. JAMES GUTHRIE,
Secretary of the Treasury.

FLOATING DOCK AT SAN FRANCISCO.

The provisions of the act of March 3, 1853, directing the Secretary of the Navy to complete and carry into execution a certain contract for the construction of a floating dock at San Francisco, are mandatory in their legal effect.

ATTORNEY GENERAL'S OFFICE,

June 17, 1854.

SIR: Your letter of the 15th instant, besides requesting an examination of the new muniments of the title of the United States to Mare Island, in the State of California, submits inquiry, in accordance with your letter of the 6th of April, as to the legal effect of a certain provision in the act of March 3, 1853, making appropriations for the naval service of the Government for the current year.

Having disposed of the question of title in a communication to you on that special subject, I now proceed to take up the other inquiry.

The language of the act of Congress is as follows:

“And the Secretary of the Navy is hereby directed to com-

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plete and carry into execution the verbal contract for a basin and railway in California, in connection with the floating dock, as made by the late Secretary in pursuance of authority for that purpose, given by the act of September the twenty-eighth, one thousand eight hundred and fifty, entitled 'An act making appropriations for the naval service for the year ending the thirtieth of June, one thousand eight hundred and fifty-one,' and as stated in the letter of the said late Secretary, addressed to the Hon. Howell Cobb, Speaker of the House of Representatives, and dated the twenty-first of January, one thousand eight hundred and fifty-one, toward the execution of which, one hundred and fifty thousand dollars is hereby appropriated: *Provided*, That, in the judgment of the Secretary, such basin and railway are necessary, and will be useful to the public service." (x Stat. at Large, p. 223.)

Upon which act the inquiry in substance is, whether its provisions leave any discretion in the premises, and, if so, how much, to the Secretary of the Navy?

As preliminary to the analysis of this provision, it is obvious to remark that the terms of the law are, on the face of it, mandatory. "The Secretary of the Navy is hereby *directed*" to do certain things.

Now, the effect of this expression has been determined by the Supreme Court. Of the numerous attempts, which individuals have made, at one time or another in the history of the Government to act on its officers by mandamus, in one case only have they succeeded,—that of *Stokes v. Kendall*,—and, in that case, the law employed the same phrase as in this case, namely, the Postmaster General "is hereby *directed*." (*Kendall v. Stokes*, xii Peters, 527.) Of course, we must regard that phrase, in the present law, as having its legal signification fixed by the highest authority.

The thing commanded is "to complete and carry into execution" a certain "verbal contract." Not to complete and *execute*; for if so, the word "execute" might be supposed to be used technically, to signify signing and sealing; but to "carry into execution," that is, to perform the acts stipulated in the "com-

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plete" contract; that is, the contract written out, signed by the parties, and otherwise invested with all the legal formalities.

To complete a thing implies that the thing has been commenced, that it is inchoate, that something remains to be done. In the present case, the thing began in a certain "verbal contract;" and the Secretary is required to do upon this whatever may be necessary to make it a "complete" contract.

The Secretary is also commanded to carry the contract, when completed, into execution, that is, to require the contractor to perform, and himself to perform in behalf of the Government, all which the contract stipulates on either side.

Next, the law indicates, with sufficient explicitness, the subject-matter of the contract. It is "a basin and railway in California," connected with a certain "floating dock."

But at this point the statute ceases to contain within itself all the elements of construction; for it fills up the description of the floating dock, by specification of the "floating dock as made by the late Secretary of the Navy in pursuance of authority for that purpose, given by the act of September the 28th, 1850," making appropriations for the naval service of the Government.

That provision is in the following words:

"For commencing the construction of a floating dry dock on the coast of California, one hundred thousand dollars; and the Secretary of the Navy is authorized to enter into a contract for the construction, with all reasonable dispatch, of a sectional or balance-floating dry dock, basin and railway, at such harbor on the coast of the Pacific Ocean as he may select, of a capacity and dimensions in no respect inferior to those of the dry dock in progress of construction at Pensacola;

"Provided, That by granting the said contractors permission, if required, to prepare the materials chiefly at some harbor on the Atlantic seaboard, and advancing moneys thereon, as the works progress, the said works can be completed at a sum not exceeding by more than twelve per cent. the total amount contracted to be paid for the floating dock, basin and railway at the Pensacola Navy Yard, with the addition thereto of what would be the cost of transportation to said coast of the said

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materials thus prepared, and with the reservation till the works are done, of ten per cent., and the usual surety for the faithful performance of the contract; and the Secretary of the Navy shall also be authorized to enter into an agreement with the contractors, if they will keep the said works in repair, and take proper care of the same, for any given period of years, free of charge to the Government, to permit them to use the said works during such period on their own account, for repairing merchant-vessels, when not occupied by vessels of the Navy, to which precedence shall, at all times, be given, on such terms as he shall deem reasonable." (ix Stat. at Large, p. 516.)

These provisions of the act of 1850 are so much in detail as to the subject-matter of the contract, that no doubt can remain on that point. It is "a sectional or balance floating dry dock, basin, and railway, at such harbor on the coast of the Pacific Ocean as he may select."

The law then recurs to the contract, as stated in the letter of the said late Secretary, Mr. Graham, of a certain date, addressed to the Speaker of the House of Representatives.

That letter is to be found in the Executive Documents of the 1st Sess. of the 32d Congress, No. 44, p. 75. In it, the Secretary, after explaining that, in execution of the act of 1850, he invited proposals for a sectional floating dock, basin, and railway, on the terms of price prescribed in that act, and after giving an account of the negotiations which ensued with divers parties, proceeds to say:

"Messrs. Dakin & Moody, and Gilbert & Secor at length offered to undertake the contract at the above estimate of \$1,538,569.44. This was declined by the Department, and Mr. James Brooks, of St. Louis, who produced unquestionable evidence of character, as well as ability to give security for the completion of the work, submitted a proposal at \$1,390,000. This being the lowest bid offered, would have been accepted, but for the reason that Mr. Brooks disclaimed any pretension to a patent right, and wished to enter into no legal controversy in respect to that alleged by the other bidders, and proposed only for the work. Doubts being entertained whether a contractor for the work might not be enjoined or otherwise impeded by a

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legal process in its execution by the claimants for the patent above mentioned, negotiations were continued with Messrs. Dakin & Moody, and Gilbert & Secor, with the knowledge of Mr. Brooks; and they were finally informed, as the last proposition of the Department, that if they would do the work on the terms stated in the law at the sum of \$1,450,000, the contract would be concluded. They desired time for consultation, and on Friday last, the 17th inst., informed the Department that they accepted the proposition. The contract has not been signed or written, nor has any bond been executed for its fulfilment; and regarding the request contained in the resolution of the House as equivalent to a command, I shall take no further step towards its completion, until the pleasure of Congress in regard to it shall be made known."

In this paragraph of Mr. Graham's letter, the "verbal contract" in question is briefly stated, but still so that it cannot be mistaken.

1. The parties are, the United States on the one side, and "Messrs. Dakin & Moody and Gilbert & Secor" on the other.

2. The latter parties are to "do the work," which work, as we have already seen, is the construction of a floating dock, basin, and railway for the use of the Navy at some selected harbor on the coast of the Pacific Ocean.

3. For which the United States are to pay them "the sum of \$1,450,000," and without price agreed, there could not have been any contract.

Such is the "verbal contract" as unequivocally stated by Mr. Graham, parties, work, price.

The concluding sentence in the extract from Mr. Graham's letter, it is perfectly evident, is the key to the provision of law under consideration. It only needs to place the two things side by side to show that they stand in the relation of cause and effect. Mr. Graham says:

"The contract has not been signed or written, nor has any bond been executed for its fulfilment; and regarding the resolution of the House, (a resolution of the 20th of the same January requesting him to suspend further action in the premises

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for a time,) as equivalent to a command, I shall take no further steps towards its completion, until the pleasure of Congress in regard to it, shall be made known."

That is, he had verbally agreed on the terms of the contract,—he was preparing to have it put in writing and signed, and to have a bond executed for its fulfilment,—when the resolution of the House arrested his progress, and caused him to abstain from completing the contract "until the pleasure of Congress in regard to it shall be made known."

Thereupon, it would seem, Congress spoke, by the provision before us, and said: "the late Secretary of the Navy (Mr. Graham) made a certain 'verbal contract' as stated in his letter to the Speaker; he was about to have it written and signed, when the House requested him to stop until it should advise in the matter; that consideration has taken place; and now we, the Congress of the United States, make known our pleasure in the premises, by directing the present or any future Secretary of the Navy to complete and carry into execution the said contract, as lawfully made by the late Secretary pursuant to law, and as set forth by him in his letter to the Speaker of the House of Representatives."

Having manifested its will in regard to this completion of the contract, Congress then proceeded to make an appropriation of \$150,000 "toward the execution" of the contract.

Thus far, the terms of the act are, in my opinion, positively mandatory; and it only remains to discuss the proviso to the clause, which is: "Provided that, in the judgment of the Secretary, such basin and railway are necessary, and will be useful to the public service."

Now, as the law distinguishes here between "necessity" and "utility to the public service," we must in order to give meaning to the language, assume that the "necessity" spoken of is something independent of the public service. I think it is the mechanical necessity of the work, which is thus implied. In all machines, great or small, parts are found, which are *necessary* to the action, or to the safety, or to the permanent value of the machine. That is a mechanical question to be solved by the Secretary by the aid of experts and of engineers.

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The question of usefulness to the public service is one which speaks for itself, and does not seem to require exposition.

As to the several parts, namely, basin and railway, permit me to suggest that Mr. Graham, in the letter before referred to, expresses the opinion that "the three structures, dock, basin, and railway, are so obviously embraced in the law (of 1850) that he does not feel at liberty to separate them, or to entertain offers for any one of them, without the whole, or for any substitute for the reparation of ships, instead of the series of works, pointed out in the act." (P. 75.) By twice employing the phrase "basin and railway" in the new act, and dealing with the contract as one contract for a series of connected things, the law appears to me to justify the impression of Mr. Graham, as to the general purpose of Congress.

I am, very respectfully,

C. CUSHING.

Hon. JAMES C. DOBBIN,
Secretary of the Navy.

 LOCALITY OF THE UNITED STATES TREASURY.

The Treasury of the United States has no locality, and credits upon it are not *bona notabilia* confined to the District of Columbia.

ATTORNEY GENERAL'S OFFICE,
 June 17, 1854.

SIR: I have reflected on the case presented by you this morning, and now proceed to state briefly the conclusions to which I have arrived.

Robert Greenhow, one of the Law Agents of the United States in California, died during the last year, at San Francisco.

Reliable information exists that he made a will and appointed an executor, who has proved the will in California.

Meantime, certain creditors of Mr. Greenhow, residing in the county of Washington, have obtained from the proper court here letters *ad colligendum*, which give to the collector power

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simply to collect and preserve the assets of the deceased here, if there be any, until the lawful executor, or an administrator with the will annexed, shall be appointed, either in the State of California, or in this county.

It does not yet clearly appear whether Mr. Greenhow had his legal domicil in the State of California or in Washington,—that being a question of fact in dispute and to be determined. But the creditors allege that, independently of the special matter stated hereafter, Mr. Greenhow left *bona notabilia* in this county, to wit, household furniture, by reason of which the court here has jurisdiction.

By the act of Congress of May 31st, 1854, a certain sum of money was appropriated, payable to “the legal representatives of Robert Greenhow.”

Mr. Visser, the collector appointed as above, now demands this money from the United States, and the question is, of the duty of the Secretary of the Treasury in the premises.

It seems to me the answer is plain, according to the most assured principles, whether of public or private law.

The several States and Territories of the Union are foreign to and independent of one another, in many relations of law. (Story’s Conflict of Laws, s. 9.) They have distinct local governments; distinct codes of law, which the authorities of the United States are bound to regard as rules of decision in cases where they apply; (i Stat. at Large, p. 92, ch. 20, s. 34; Mut. Ass. Soc. v. Watts, i Wheaton, 279; Elmendorf v. Taylor, x Wheaton, 152; Shelby v. Grey, xi Wheaton, 351;) and these distinct laws govern in all cases not arising under the Constitution or acts of Congress, not only as to rights in land, (Thatcher v. Powell, vi Wheaton, 119,)—but also as to marriage and divorce, Bishop, ch. 2; Burtis v. Burtis, i Hop. Ch. R. p. 567,)—commercial contracts, (Story’s Conflict of Laws, ch. 8, passim,)—and a multitude of other cases, including wills and testaments, the administration of the estates of persons deceased and succession to property. (Story’s Conflict of Laws, ch. 11, 12, 13, passim.)

Hence, as between any two States or Territories of the Union, there may be conflicting claims of domicil, or of *bona*

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notabilia, and so controversy as to the jurisdiction, in testamentary cases; there may be distinction of primary and ancillary administration; and the locality of the administration may control the distribution of assets among creditors or heirs-at-law.

Hence, also, as a general rule in the United States, an executor or administrator, in order to obtain possession of the assets of the deceased, lying in any given State, must sue out letters testamentary, or of administration, according to the laws of that State. (*Fenwick v. Sears*, i Cranch, 259; *Dixon's Exec. v. Ramsay's Exec.*, iii Cranch, 319; *Kerr v. Moon*, ix Wheat. 565.)

But this doctrine does not apply to the District of Columbia, which includes the county of Washington, as a general rule, nor without many qualifications.

In the first place, the District of Columbia is not a State or Territory, either in the relation of suits in the courts of the United States, (*Hepburn v. Ellzey*, ii Cranch, 444,) or in that of sovereign rights under the Constitution.

In the second place, the act of Congress of the 24th of June, 1822, sec. 11, provides that it shall be lawful for any person, to whom letters testamentary or of administration shall have been granted by the proper authority, in any of the United States or the Territories thereof, to maintain actions and prosecute claims in the District of Columbia, in the same manner as if the letters testamentary or of administration had been granted to such person by the proper authority in said District. (ii Stat. at Large, p. 758.)

The recognised object of this law was, to enable executors or administrators, duly appointed in any State or Territory of the Union, to collect debts in this District, not of the Government alone, but of any persons whatever being here, and to give discharge therefor without the grant of any local letters of administration. It made all debts due from persons in the District, not local assets, for which a personal representative would be liable to account in the courts of the District,—but general assets, which he has full authority to receive, and for which he is bound to account in the courts of the state from which he de-

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rived his original letters of administration. (*Vaughan v. Northrup*, xv Peters, p. 1; *Kane v. Paul*, xiv Peters, p. 33.)

Finally, it is well settled that the debts due from the Government of the United States have no locality at the seat of government. The United States in their sovereign capacity, says the Supreme Court, have no particular place of domicile, but possess in contemplation of law an ubiquity throughout the Union. (*Vaughan v. Northrup*, xv Peters, pp. 1, 6.)

It would, indeed, be wholly subversive of the fundamental theory of the Government to assume that all debts due from the United States are to be treated as local assets, so as to draw the administration and distribution thereof away from the State in which the decedent is domiciled, and subject them to the local law of the District of Columbia.

The conclusion from all which is irresistible, that the county of Washington has no lawful authority to meddle with the money in question, whether by appointment of administrator or collector, unless here is the exclusive and only lawful domicile of Mr. Greenhow, or unless his will be voluntarily proved here by his executor.

As to this last point, it suffices to say that if the Ordinary in this county have jurisdiction of the estate of Mr. Greenhow, *virtute domicilii*, still it cannot, on suggestion of the existence of a will and an executor, grant letters of administration to another person without previous citation of the executor, (*Lyon v. Balfour*, ii Add. 501,) or proof of his incapacity, (*Griffith v. Griffith*, viii Cranch, p. 11; see i Williams on Exec. p. 271 and seqq.)

✓ In the present case, the executor, whoever he may be, is the only person entitled to be considered as that lawful representation of Robert Greenhow, to whom the allowance is made by Congress. The collector is a person of doubtful authority, if any, who seeks to divert the assets from their lawful destination, or, which amounts to the same thing, to anticipate the possession of those assets by the executor.

It is suggested in behalf of the application of Mr. Visser, that local creditors exist here, whose interests or convenience will be promoted by this money going into his hands. So there

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may be creditors in California, whose interests or convenience will be consulted by the settlement of the estate there. Considerations of this nature cannot influence the action of the Secretary of the Treasury in such a case, both classes of creditors being in a legal sense equally related to the Treasury of the United States; and the jurisdiction of the District of Columbia is not entitled to any legal advantage as against that of the State of California.

Whether the letters *ad colligendum* are valid or not as to the alleged *bona notabilia* existing in private hands in the county of Washington is a matter for the courts to settle, and which does not concern the United States.

I am, very respectfully,

C. CUSHING.

Hon. JAMES GUTHRIE,
Secretary of the Treasury.

CORONER OF THE COUNTY OF WASHINGTON.

The fees of inquests *super visum corporis* in the county and city of Washington are to be paid out of the goods and chattels of the deceased.

In default of such goods, said fees are a charge on the county, to be defrayed by the Levy Court, and are not lawfully payable by the United States.

ATTORNEY GENERAL'S OFFICE,

June 19, 1854.

SIR: I have examined the accounts of the Coroner of the county of Washington, for fees on inquests *super visum corporis*, and the questions arising thereon, as presented by your communication of the 21st of April.

You suggest inquiry as to the duty of the coroner in regard to inquisitions, and as to the fees to which he is entitled. I do not perceive any difficulty in either branch of the inquiry.

A statute of Maryland, which is now in force in the county and city of Washington, and which will be cited more particularly hereafter for another purpose, prescribes the cases in which he is to view the body. They are of "persons murdered or slain, or otherwise dead by misadventure."

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He is to make view of the body, not officiously, but on the invitation of the friends of the deceased, or the suggestion of bystanders, neighbors, or conservators of the peace.

In the case of the King against the Justices of Kent, (xi East's R., p. 229,) a mandamus was moved for to compel the said justices to allow the coroner's account for his fees on an inquisition taken by him *super visum corporis*, which the said justices disallowed, they being of opinion that the inquisition was improperly taken. The court refused the mandamus, considering the justices the proper judges whether the inquisition had been duly taken, as the law requires; and Lord Ellenborough, Ch. J., proceeded to censure the officiousness of coroners in "obtruding themselves into private families, to their great annoyance and discomfort, without any pretence of the deceased having died otherwise than a natural death:" which he declared to be "highly illegal," and the exercising their office "in the most vexatious and oppressive manner."

Nevertheless, it seems to me doubtful whether you have any authority to instruct the coroner, as to his duties in this respect.

I investigated the question, also, of the fees of this officer,—but relinquished the idea of stating them, for the present at least, on arriving at the most unequivocal and decided conviction that the coroner of this county and city has no more right to call on the United States to pay him fees in these cases, than he has to demand them of the State of Michigan. Of course, the accounting officers of the Treasury have no concern with the question of the amount of his fees;—they are to be settled and paid by the local authorities either of the county or city of Washington.

I think this can be demonstrated to your entire satisfaction.

By the common law of England, the coroner, so called because he deals principally with pleas of the Crown, had a judicial authority in certain cases, and his court was a court of record. (ii Inst. 31–32; iv Inst. 271, chap. 59; vi Viner, Coroner, (A), p. 242.

And, besides his judicial place, he hath also authority, ministerial as a sheriff, &c., viz., when there is just exception to the

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sheriff, judicial process shall be awarded to the coroner * * * in which case, he is *locum tenens vice-comitis*, and in some special case, the original writ shall be directed to the coroner." (iv Inst., 271, chap. 59; Black. Comm., book 1, chap. 9, p. 349; vi Viner, Coroner, (H), p. 254.)

By the common law the coroner was not allowed fees for executing his judicial duties. "And this was the ancient law of England, that none having any office concerning the administration of justice, should take any fee or reward of any subject, for the doing of his office, to the end that he might be free and at liberty to do justice, and not to be fettered with golden fees, to the suppression or subversion of truth and justice." (ii Inst., 176, chap. 10; Bacon Ab. Coroner, (G), p. 437; ii Hawk. P. chap. 9, sec. 46, p. 85.)

But the statutes of England gave the coroner fees for inquisitions *super visum corporis*, in certain cases, to be paid out of the goods and chattels of the slayer or murderer, or out of the county rates, (ii Hawk., P. C. ch. 9, sec. 47-48-49-50-51; i Bacon Ab. Coroner, (G), pp. 497-498.)

Those particular statutes, however, were not in force in Maryland on the 27th of February, 1801, when Congress adopted the law of Maryland, as then existing, for that part of the District of Columbia, which was ceded by that State to the United States, and by them accepted as the permanent seat of government.

By that act, entitled, "An act concerning the District of Columbia," (ii Stat. at Large, p. 103, chap. 15, sec. 1 and 2,) the District of Columbia was divided into two counties; the one called the county of Washington, containing all that part of the District lying on the east side of Potomac river; the other called the county of Alexandria, containing all that part of the District lying on the west side of said river; and the river in its whole course through the District to be taken to be within both of said counties. It also enacted that "the laws of the State of Virginia, as they now exist, shall be and continue in force in that part of the District of Columbia, which was ceded by said State to the United States, and by them accepted for the permanent seat of government; and that the laws of the State of Maryland, as they now exist, shall be and continue in

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force in that part of the said District, which was ceded by that State to the United States, and by them accepted as aforesaid."

By the act of Congress of March 3d, 1807, (ii Stat. at Large, p. 431, chap. 23, sec. 6,) "All temporary statutes of the States of Virginia and Maryland," which were adopted by the act of 27th February, 1801, "shall not expire within the District of Columbia by virtue of any limitation in said statutes contained, but shall remain in force in the District as at the time of their adoption, unless other provision has been, or shall be, made by Congress respecting the same."

We are, therefore, to look, in the first place, for the fees of coroners, and the funds for payment of them, to the laws of Maryland and Virginia, respectively, as they existed on the 27th of February, 1801, as adopted by the Congress of the United States for the government of the District of Columbia.

By the common law, coroners for the counties, respectively, were elected by the freeholders of the county. (ii Inst. 174; iv Inst. 271; vi Viner, Coroner, (B), p. 243; i Bac. Ab., Coroners, (A), p. 491-492; ii Hawk. P. C. chap. 9, sec. 1-5-10.) But, by the law of the State of Virginia, in each county, as often as a vacancy occurs in the office of coroner, "The justices of the county court shall nominate two fit and discreet persons * * * one of which, being approved by the Governor with the advice of the Council, shall be commissioned by the Governor to execute the office of coroner within such county or corporation during good behavior." (Act passed 29th Nov., 1792, Revised Code published in 1794, chap. 81, p. 131.) And by the act of the legislature of Virginia passed December 19th, 1792, (same book, p. 229, chap. 115,) the fees to the coroner are—"For taking an inquisition on a dead body, to be paid out of the estate of the deceased, if the same be sufficient, if not, by the county, two dollars eighty cents." "For all other business done by him, the same fees as are allowed to the sheriff for the same services."

By the constitution of Maryland, all civil officers, whether for the State at large, or county officers, howsoever elected, or appointed, except assessors, constables, and overseers of roads, were to be *commissioned* by the Governor by and with the

advice and consent of the Council, (Kilty's ed. vol. 1, Constitution, sec. 48;) and the form of the commission to the coroner of the county is given, (i Kilty, act of February, 1777, chap v.) And the act of 1779, entitled "An act for the regulation of officers' fees," (Kilty's ed., 1779, chap. 25, sec. v,) fixes the coroner's fees as follows:

"Viewing the body of any person or persons *murdered or slain, or otherwise dead by misadventure*, to be paid out of the goods and chattels of the party so dead, if any there be, otherwise to be levied by the commissioners of the county where such accident shall happen, two hundred and fifty pounds of tobacco.

"Attesting or summoning any sheriff sued or prosecuted in any court, and for taking security, twenty-six pounds of tobacco.

"The same fees allowed wherein the sheriff is plaintiff or defendant, on all processes as to the sheriff, and no more."

So that by the laws of Virginia and Maryland, adopted by the act of Congress of February 27th, 1801, as then existing for the District of Columbia, the coroner's fees for inquisitions, *super visum corporis*, were to be paid out of the goods and chattels of the deceased, if any, otherwise out of the county levy.

By the act of Congress, passed March 3d, 1801, (ii Stat. at Large, p. 115, chap. 24,) it was enacted, in reference to this District:

"Sect. 1. That all officers, for whom no special provision is made in this act, or the act to which this is a supplement, shall receive the same fees and emoluments as they have respectively received under the jurisdiction of the respective States."

"Sect. 4. That the magistrates to be appointed for the said District shall be and they are hereby constituted a board of commissioners within their respective counties, and shall possess and exercise the same powers, and perform the same duties, receive the same fees and emoluments as the levy courts, or commissioners of the county for the State of Maryland. * * *

By the 13th sect. of the act of Congress of May 15th, 1820, (iii Stat. at Large, p. 590, chap. 104,) "The levy court in the county of Washington, in the District of Columbia, shall not possess the power of assessing any tax on property in the City of Washington; nor shall the corporation of the said city be

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charged to contribute in any manner towards the expenses and expenditures of said court,—except for the one-half part of the expenses incurred on account of the Orphans' Court, *the office of coroner*, and the opening and repairing of roads in the county of Washington, east of Rock Creek, leading directly to the city of Washington."

In this act, the law is expressly recognised as existing and continuing, that the fees to the coroner for his inquisitions, *super visum corporis*, are not charges upon the Treasury of the United States, but upon the local inhabitants of the places within his jurisdiction.

And while the act of July 1st, 1812, sect. 8, (ii Stat. at Large, p. 773,) repeals all pre-existing laws so far as they vest in the Levy Court a power to lay taxes, yet the same act authorizes the Levy Court to lay a tax on the property in the county for *all county purposes*; which clearly includes the expenses of the county of Washington.

The 8th section of the act of Congress, approved July 7th, 1838, (v Stat. at Large, p. 307, chap. 192,) enacts: That there shall be hereafter paid to the coroners of the counties of Washington and Alexandria in the said District, and to the jurors and witnesses, who may be lawfully summoned by them in any inquest, the same fees and compensation as are now paid to the marshal of the said District, and the jurors attending the Circuit Court in said county for similar purposes."

This act did not, by any possible implication, repeal the statute of Maryland, which makes the goods and chattels of the deceased in the first instance, and then the county, chargeable with all the costs of inquests *super visum corporis*; nor did it in the remotest degree tend to the repeal of the act of Congress, which charges the county or city with the expenses of "the office of coroner." It had no other effect than to change the rates of certain fees and compensation, so as to make these conform to the act of March 3d, 1807. (ii Stat. at Large, p. 431, chap. 23.) As to the coroner of the county of Washington, in the District of Columbia, it substituted the rate of one dollar seventy-five cents for one hundred pounds of tobacco (in the 4th sect. of the said act of 1807) instead of twelve shillings and sixpence

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for every hundred pounds of tobacco at seven shillings and sixpence to the dollar, as fixed by the law of Maryland, (i Kilty, act of 1779, chap. 25, sec. 5; and the act of 1780 cited in that section,) to be paid according to the before-recited 13th section of the act of Congress of May 15th, 1820, (iii Stat. at Large, p. 590, chap. 104,) in case of the deficiency of the goods and chattels of the deceased, one half by the city of Washington, and the other half by the Levy Court of the county of Washington in the District of Columbia. There is, therefore, no color of authority for paying the fees of the coroner, or the expenses of his office, for inquisitions *super visum corporis*, out of the Treasury of the United States.

If, for just exception to the marshal, the coroner shall be called to attend the court, or to execute civil process, then, as *locum tenens* of the marshal, the coroner would be entitled, for such ministerial services in place of the marshal, to the like fees and emoluments, and payable out of the same funds, private or public, as the marshal would have been if he had performed the services.

As to fees on inquests *super visum corporis*, the justices of the Levy Court, or the city corporation, being responsible for these, will of course take care that they do not exceed the due amount, and will counsel the coroner in regard to the cases on which he shall hold inquisitions.

I suppose this functionary is appointed by the Circuit Court of the District of Columbia, under a somewhat vague power of appointment, by which that court is invested with the same power and authority (as to appointments) as have been heretofore exercised by the County and Levy Courts of the State of Maryland; with power to appoint all other officers necessary for the District under the laws of the respective States of Maryland and Virginia. (ii Stat. at Large, p. 115.) But I am not aware of any statute of Maryland, or of the United States, which defines the appointment of coroner by *name*. And it is not perfectly clear that the assumed power of appointment in the Circuit Court by the act of 1801, is compatible with a provision of the same act, which vests in the Levy Court of the county of Washington *all the powers of the Levy Courts* of the State of Maryland.

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At any rate, whether he have any lawful appointment or not, he is not appointed by, nor, except when serving process in place of the marshal, is he anywise directly responsible to, the Executive of the United States.

The material conclusions of law, in so far as regards the Government, are, in my opinion, clear beyond all possibility of doubt, to wit:

1. The fees of inquests *super visum corporis* in the county and city of Washington are "to be paid out of the goods and chattels of the party deceased if any there be," pursuant to the statute of Maryland still in full force, and unrepealed in this part of the District.

2. In default of such goods and chattels of the deceased, said fees are to be levied by the commissioners of the county, not only in pursuance of the statute of Maryland standing still unrepealed and in full force here, but also by express provision of an act of Congress.

Whatever fees in the premises have been paid to the coroner heretofore out of the Treasury of the United States, have been paid, it seems, by traditional practice for some years, in consequence of an erroneous construction of the act of 1838, adopted without due reflection and examination at the Treasury Department. That construction was manifestly against law. I do not recommend that the coroner be called upon to refund the money he has thus received. The Government has voluntarily paid in its own wrong, and perhaps ought to submit to the loss. I am accustomed to advise acquiescence in what is done as done. But, as to the present and the future, it is my duty to say that, in my judgment, it would be a gross and palpable violation of law to pay another dollar from the Treasury for the expense of inquests *super visum corporis* in the city and county of Washington.

I am, very respectfully,

C. CUSHING.

Hon. R. McCLELLAND,
Secretary of the Interior.

Provisions and Clothing for the Navy.

EXPENSES INCIDENT TO PURCHASING PROVISIONS AND CLOTHING
FOR THE NAVY.

The incidental expenses attending the purchase, care, preservation, and transportation of provisions and clothing for the Navy are not chargeable to the specific appropriations for provisions and clothing.

ATTORNEY GENERAL'S OFFICE,

June 22, 1854.

SIR: I have considered the questions submitted by your communication of the 20th of February.

The questions are two, namely:

"1. Can the expenses attending the purchase, care, preservation, and transportation of provisions for the Navy be charged to, and paid from, the appropriation for provisions?"

"2. Can the like expenses with regard to clothing for the Navy be charged to, and paid from, the appropriation for clothing?"

I think the best clue to the satisfactory solution of these questions will be found in a brief exposition of the legislation upon these points, and the changes it has undergone.

In the early years of the Government under the Constitution, the Navy was small, the naval and military forces were under the superintendence of the War Department, and the appropriation for the naval service specified but few heads of appropriations. The appropriations for pay and subsistence were blended; the appropriations for clothing were distinct, but not charged with contingencies; and the appropriations for contingent expenses were general, without enumeration, and so applicable to all branches of the service.

The Department of the Navy was established by act of 30th April, 1798, (i Stat. at Large, p. 553, chap. 35.) After that the heads of appropriation began to be multiplied. But the appropriations for provisions and for clothing remained unburthened by the contingent expenses thereof.

By act of May 10, 1800, (vol. 2, p. 79, chap. 57,) the appropriations for the naval service were several and distinct, "For pay; for subsistence; for provisions; for contingent expenses,

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including the waste of military stores, the expense of the Navy store at Philadelphia, and for similar expenses at Boston, Newport, Baltimore, Norfolk, New York, and other ports." Appropriations were made in the same bill for the marine corps by separate appropriations for each class of expenditure, similar to those for the Navy proper.

By this it will be seen that the appropriations for provisions and for clothing were not encumbered with contingent expenses; for the naval stores at the various sites and ports, with all the contingent expenses incident to them, are expressly included in the separate appropriation for contingent expenses. This manner of appropriating for the naval service continued. In 1825, February 21, (iv vol. p. 13, chap. 12,) the act making appropriations for the naval service for the year 1825, contained appropriations—

"For pay and subsistence, other than those on shore, or at navy-yards, and in ordinary, \$783,554.47. For pay and subsistence * * * at navy-yards, shore stations, and in ordinary, \$279,364.73.

"For provisions, \$355,875."

For various other heads of specific appropriations, different sums. "For defraying the expenses which may accrue during the year 1825 for the following purposes:

"For freight and transportation of materials and stores of every description, for wharfage and dockage, * * * for traveling expenses of officers, * * * for printing and stationery of every description," * * * with various other enumerations of contingencies, in all making about twenty-three heads, \$200,000.

"For contingent expenses for objects arising in the current year, and not hereinbefore enumerated, \$5000."

In the same bill there were separate and distinct appropriations for pay and subsistence, for clothing, &c., &c., of the marine corps, and for contingent expenses of that corps.

In the act of 3d March, 1826, (vol. iv, p. 140, chap. 12,) the appropriations for the naval service for that year contained these heads, among others:

"For pay and subsistence of officers and seamen, other

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than those at navy-yards, shore stations, and in ordinary, \$908,595.50.

“For pay and subsistence and allowance of officers, seamen, and others at navy-yards, shore stations, hospitals, and in ordinary, \$141,613.75.

“For defraying the expenses which may accrue during the year 1826, for the following purposes: For freight and transportation of materials and stores of every description; for wharfage and dockage; for stowage and rent; for travelling expenses of officers and transportation of seamen * * *; for premium and incidental expenses of recruiting service; for postage * * *; for printing and stationery of every description,” * * *; with various other enumerated classes of contingencies, containing each several species; in all making about twenty-one or twenty-two heads, or enumerated classes, * * \$240,000.

“For contingent expenses for objects arising during the year 1826, and not hereinbefore enumerated, \$5000.”

The appropriations for the marine corps under similar heads of “Pay and subsistence,” “Clothing,” “For contingencies therein mentioned, and for expenses not hereinbefore enumerated,” with other special objects and specific appropriations for the marine corps, are also in the same act.

In this manner of appropriating, it seems clear, that neither the sum appropriated for provisions, nor the sum appropriated for clothing, is chargeable with the contingent expenses of their procurement, safe-keeping, or transportation to or from place to place.

This form of making appropriations for the naval service was continued, uniformly and uninterruptedly, from this act of 1826, every year down to the act approved 3d March, 1843, (Vol. v, p. 615, ch. 83,) entitled “An act making appropriations for the naval service for the half calendar year beginning the first day of January and ending the thirtieth day of June, 1843, and for the fiscal year beginning the first day of July, 1843, and ending the thirtieth day of June, one thousand eight hundred and forty-four.”

This statute appropriated:

“For provisions for the Navy, including cooperage, trans-

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portation, and other expenses for said half-calendar year, \$362,769.50, and for the said fiscal year, \$623,653.

“For clothing for the Navy, including transportation and every other expense, to be reimbursed out of the sales of the clothing for said half-calendar year, \$380,000.

“For defraying the expenses that may accrue for the following purposes, viz.:

“For freight and transportation of materials and stores of every description—for wharfage and dockage, storage and rent * * printing and books, * * &c., &c., (pursuing the enumeration in the previous statutes,) \$450,000.”

“For contingent expenses for objects not enumerated for said half calendar year, \$1500, and for said fiscal year, \$3000.

For the marine corps, appropriations were made in this act of 1843:

“For provisions—for the half calendar year, \$19,128.08, and for the fiscal year, \$38,678.80.

“For transportation—for the half calendar year, \$4000; and for the fiscal year, \$8000.

“For contingent expenses of said corps, viz.: for freight, ferriage, toll, wharfage, and cartage * * * printing and stationery, * * * &c., &c., for the half calendar year, \$8990, and for the said fiscal year, \$17,980.”

This act by express words subjected the appropriations for provisions and for clothing for the Navy proper, to the contingent expenses, while the same act did not subject the appropriations for provisions and for clothing for the marine corps to the contingent expenses thereof, but required them to be paid out of the appropriation for contingent expenses.

This charging of the contingent expenses of provisions and clothing, in express terms upon the specific appropriations for those objects, was an exception from the practice of all previous years, an apparent anomaly introduced at changing the appropriations for the natural calendar year to the fiscal year from 30th June in one year to 30th June of the next.

This anomaly was continued as to the appropriations for provisions in the act of 17th June, 1844, (v Statutes at Large, p. 701, chap. 107,) and was repeated both as to provisions and

Provisions and Clothing for the Navy.

clothing in the act of 3d March, 1845, (vol. v, p. 791, ch. 77,) in making the respective appropriations therefor, for the naval service of the fiscal year ending 30th June, 1846, and as to provisions in the act of 10th June, 1846, (vol. ix, p. 97, chap. 176.)

The words "including transportation, cooperage, and other expenses," annexed to the appropriations for provisions, and the words "including the transportation and every other expense," annexed to the appropriations for clothing, so introduced into the acts of March 3d, 1843, June 17th, 1844, March 3d, 1845, and June 11th, 1846, have been omitted in all the subsequent acts making appropriations for the naval service, in respect of provisions and clothing.

See acts March 3d, 1847, (vol. ix, p. 169,) August 3d, 1848, (vol. ix, 1, 266,) March 3d, 1849, (vol. ix, p. 374,) 28th Sept., 1850, (vol. ix, p. 513,) March 3d, 1851, (vol. ix, p. 621,) August 31st, 1852, (Session Acts, p. 101,) March 3d, 1853, (Sess. Acts, p. 220.)

In the acts of 31st August, 1852, and 3d March, 1853, there are no words to encumber the appropriations for provisions with the charges of transportation and other incidental expenses.

Over and above the specific appropriations for particular objects, there are appropriations in each act "For contingent expenses that may accrue for the following purposes, viz., freight and transportation; printing and stationery; advertising newspapers," with various other enumerations, which are sufficiently comprehensive in terms to embrace all contingent expenses liable to accrue in relation to provisions and clothing over and above their prime cost.

It thus appears that, during the long period of time anterior to the year 1843, the language of the statutes continued to be in substance the same, and that language did not, in express terms, charge the contingencies for clothing and provisions on that part of the appropriation, and apparently left those contingencies to be paid out of the general head of contingencies.

The obvious and natural construction of this language became, as appears from the communication of the Second Comptroller, the received construction; and the expense of the storage and

Expenses incident to Purchasing

transportation of both provisions and clothing were charged to the head appropriation for contingencies.

From 1843 to 1845 or 1846, the language of the acts was different, and, by express injunction, makes transportation and other contingencies of provision and clothing chargeable to the appropriations for provisions and clothing, and of course not chargeable to the general appropriation for contingencies.

This new language of legislation in effect justifies the then received construction of the previous statutes; for, if the contingencies in question were already chargeable to the appropriation for clothing and provision, there was no occasion to adopt the new terms of enactment. Of course, when, in 1847, and so on down to the present time, the newly interjected words of appropriation are dropped, and the language of the statutes as it was before 1843 is restored, there is double reason for assuming that Congress intended a return to the pre-existing law with its construction.

Here, in the act of 1853, are phrases long used, with a received meaning. Congress had for a few years employed other words, with a different meaning. It now resumes the old words, and we must intend that it does so with knowledge of the legal consequences, in the restoration of the old construction.

Suggestion is made in your letter as to the relation of the estimates of the Bureau of Clothing and Provision; but it does not seem to me that any satisfactory conclusion can be deduced from those estimates.

Suggestion is also made as to the certain collateral purposes of Congress as to provisions and clothing; but those purposes do not appear to me to control in fact the construction of the law in this respect; and if public policy dictates the expediency of such a state of law in these points as existed in 1843 and 1844, it seems to me better to provide for it by explicit and express legislation, as was done at that time.

Manifold examples might be produced to show that when Congress has intended to make any object of appropriation an exception from the general appropriation for contingent expenses, and to burthen the particular appropriation for that object with incidental expenses and charges, it has expressly so enacted. Thus

Provisions and Clothing for the Navy.

in the act of 3d March, 1853, making appropriations for the naval service, we find, "For ordnance and ordnance stores and small arms, including incidental expenses, \$200,000." In the appropriation for the Hydrographical Office and Observatory, for models drawing and copying, &c., &c., "for keeping grounds and buildings in order," &c., &c., and "for all other contingent expenses of the Hydrographical Office and United States Observatory, \$7240. For continuing the publication of the Wind and Current Charts, and for defraying all the expenses connected therewith, \$10,000." In the various appropriations in this same act of 1853, for the navy yards and objects to be accomplished in each, we find the words "and for repairs of all kinds," annexed to each appropriation.

It seems not to have been the intention of Congress that the supplies for the Navy of the necessaries of provisions and clothing should be dependent upon, or liable to be in any degree diminished by, contingent expenses of transportation or other burthens upon the funds appropriated for those objects. The exceptions introduced into the acts of 1843, 1844, 1845, and 1846, were abandoned in the act of 1847, and the practice pre-existing has been observed in all the appropriations for provisions and clothing for the Navy ever since.

Upon the whole, therefore, my opinion is:

1st. That the expenses attending the purchase, care, preservation and transportation of provisions for the Navy cannot be properly charged to, and paid from, the appropriation for provisions.

2d. That the like expenses with regard to clothing for the Navy cannot be properly charged to, and paid from, the appropriation for clothing.

I am, very respectfully,

C. CUSHING.

Hon. JAS. C. DOBBIN,
Secretary of the Navy.

Reopening of Accounts.

REOPENING OF ACCOUNTS.

When accounts settled at the Treasury are for any lawful cause reopened at the request of a claimant, and to correct errors in his behalf, they are to be considered open for errors in behalf of the Government.

ATTORNEY GENERAL'S OFFICE,

June 23, 1854.

SIR: I beg leave to add the following suggestions regarding one point of the case of the coroner of Washington, in addition to what is said in my letter of the 19th instant.

The coroner applies to have rectified an error of law to his prejudice committed heretofore by the accounting officers of the Treasury.

That alleged error consists in those officers not allowing him so much for fees on inquests *super visum corporis*, as he thinks he ought to have had. In fact, he ought not to have had anything for such fees.

Accounts have sometimes been opened on the application of a party for the correction of a manifest error of law committed to his prejudice. (See Mr. Legare's opinion, August 4th, 1842, ante, vol. iv, p. 79.)

But if one party insist on having the accounts opened to readjust them, in the view of correcting an error committed to his prejudice, on their being thus opened, it would be the right and the duty of the accounting officers to correct, at the same time, any error committed to the prejudice of the other party.

The effect of this will be that, if the accounts are reopened at the instance of the coroner, the readjustment must be complete and legal in all its parts, and he may be called upon to account for all the money he has received unlawfully heretofore by the mistake of the Government.

I am, very respectfully,

C. CUSHING.

Hon. ROBERT McCLELLAND,

Secretary of the Interior.

Exterritoriality of Military Sites.

EXTERRITORIALITY OF MILITARY SITES OCCUPIED BY THE UNITED STATES.

The persons, in the employment of the United States, actually residing in the limits of the Armory at Harper's Ferry, do not possess the civil and political rights, nor are they subject to the tax and other obligations, of citizens of the State of Virginia.

ATTORNEY GENERAL'S OFFICE,

June 24, 1854.

SIR: Your communication of the 10th of March, enclosing letters from Colonel Craig of the Ordnance, and also from Colonel Huger, the officer of Ordnance in charge of the Armory at Harper's Ferry, presents the question whether officers of the Army, or other persons, residing on lands of that establishment belonging to the Government, are liable to taxation by the State of Virginia.

This question is wholly independent of that decided in the case of *The United States v. Weiss*, which was of the legality of a State tax imposed on the property of the United States at Carlisle Barracks.

In that case the Circuit Court very properly decided that the property of the United States was not subject to be taxed by the authorities of the State. (xi Penn. L. Jour. p. 88, S. C., National Intelligencer, July 29th, 1851.)

This decision is in conformity with the doctrine of the Supreme Court in the case of *McCulloch v. The State of Maryland*, (iv Wheaton, p. 316,) and in that of *Weston v. The City of Charleston*, (ii Peters, p. 449.)

The present question is, not of the property of the United States, but of the persons and property of an officer or employee of the United States, residing on land of which the property and jurisdiction have been ceded to the United States.

The site of Harper's Ferry was duly purchased by the United States, in virtue of a legislative act of the State of Virginia of the 28th November, 1794. The validity of this act, and the consequent jurisdiction of the United States, have since been fully recognised by the State of Virginia. (See Rev. Code of 1849, tit. i, ch. 2, p. 58.)

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Upon these acts of the State of Virginia, the land in question became subject to the following clause of the Constitution, namely:

“Congress shall have power to exercise exclusive legislation, in all cases whatever * * over all places purchased by the consent of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings.” (Art. i, s. 8, no. 16.)

“Exclusive legislation” signifies exclusive jurisdiction; and this follows, even although the legislature of the State, in its act assenting to the purchase, have not expressly ceded such jurisdiction. It vests in the United States by virtue of the Constitution. (Sergeant’s Const. L. p. 350.)

The constitutional conditions, be it observed, are two,—purchase by the United States, and consent of the legislature of the State. By that consent, the State voluntarily and knowingly parts with its jurisdiction. It is not lost on the mere ownership by the United States. (The People v. Godfrey, xvii Johnson’s R., p. 225; Commonwealth v. Young, Bright’s R., 302; i Hall’s Journal, p. 47, S. C.) Both conditions exist in the case of the Armory at Harper’s Ferry.

There is, in the acts of the State of Virginia, a reservation as follows:

“It is hereby declared that this State retains concurrent jurisdiction with the United States over said places, (so far as it lawfully can, consistently with the acts before mentioned,) and its courts, magistrates, and officers may take such cognisance, execute such process, and discharge such other legal functions, within the same as may not be incompatible with the true intent and meaning of said acts.” (*Ubi supra.*)

A similar reservation is common in the correspondent acts of other States, and sometimes in more absolute language than that employed by the State of Virginia.

But it is well settled that the sole object and only legal effect of such reservations by the State is to prevent these places from becoming a sanctuary for fugitives from justice for acts done within the acknowledged jurisdiction of the State. (United

States v. Cornell, ii *Mason*, p. 60; *United States v. Davis*, v *Mason*, p. 356.)

In all other respects, the extritoriality of the Armory at Harper's Ferry, and other like places, is complete, in so far as regards the State in which they lie. (See *Cohens v. The State of Virginia*, vi *Wheaton*, p. 424 to 429; *Story on the Constitution*, sec. 1236 et seq.; 1 *Kent's Com.*, p. 429; *Rawle on the Const.*, p. 238.)

This extritoriality has been recognised by judicial decisions in the States.

Thus, in Massachusetts, it has been decided that the Commonwealth cannot take cognisance of an offence committed within the limits of the Armory at Springfield, (*Commonwealth v. Clary*, viii *Massachusetts R.*, p. 72.)

So, in the same State, it has been adjudged that a vessel, transporting stone from the State of Maine to the Navy Yard in Charlestown, is not subject to the law of the State regulating such vessels, the Navy Yard *not being within the State* in the sense of the law. (*Mitchell v. Tibbetts*, xvii *Pickering's R.*, 298.)

The doctrine of these cases covers the question now before me. In the case of the *Commonwealth v. Clary*, the Supreme Court of Massachusetts say:

"An objection occurred to the minds of some members of the Court, that, if the laws of the Commonwealth have no force within this territory, the inhabitants thereof cannot exercise any civil or political privileges under the laws of Massachusetts within the town of Springfield. We are agreed that such consequence necessarily follows; and we think that no hardship is thereby imposed on those inhabitants, because they are not interested in any elections made within the State, or held to pay any taxes imposed by its authority, nor bound by any of its laws. And it might be very inconvenient to the United States to have their laborers, artificers, officers and other persons employed in their service, subjected to the services, required by the Commonwealth of the inhabitants of the several towns.

"It will be noticed that in this decision we make a distinction between persons who actually dwell within the territory owned

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by the United States and the laborers and artificers employed therein who have their dwelling elsewhere." (viii Massachusetts R., p. 77.)

All the incidental views of the court in this case are in effect adopted and reaffirmed by the Supreme Court of Massachusetts in the case of *Mitchell v. Tibbetts*.

The same opinion, as to the disabilities and the exemptions of persons residing in such places, is expressed in the case above cited from Pennsylvania, of the *Commonwealth v. Young*.

Subsequently to the decision in the State of Massachusetts above cited, the legislature, under a general authority conferred by the Constitution of that State, called on the Supreme Court of the State for its opinion on the following questions, namely:

"1. Are persons residing on lands purchased by, or ceded to, the United States, for navy yards, arsenals, dock-yards, forts, light-houses, hospitals, and armories, in this Commonwealth, entitled to the benefits of the state common schools for their children, in the towns where such lands are located?

"2. Does such residence exempt such persons from being assessed for their polls or estate, in the towns in which such places are located?

"3. Will such residence, for the requisite length of time, give such persons, or their children, a legal inhabitancy in such towns or in the Commonwealth?

"4. Are persons so residing entitled to the elective franchise in such towns?"

The Supreme Court of Massachusetts, aware that these questions, though general in scope, yet had in their intention special application to the Navy Yard at Charlestown and the Armory at Springfield, considered the subject carefully, entered into exposition of the form and effect of the provision of the Constitution of the United States in the sense herein before expressed by me, quoted and adopted the cases of the *Commonwealth v. Clary*, and of *Mitchell v. Tibbetts*, and stated their general opinion in the following words:

* * "We are of opinion that, where the general consent of the Commonwealth is given to the purchase of territory by the

Occupied by the United States.

United States, for forts and dock yards, and where there is no other condition or reservation, in the act granting such consent, but that of a concurrent jurisdiction of the State for the service of civil process, and criminal process against persons charged with crimes committed out of such territories,—the Government of the United States have the sole and exclusive jurisdiction over such territory, for all purposes of legislation and jurisprudence, with the single exception expressed, and consequently no persons are amenable to the laws of the Commonwealth for crimes and offences committed within said territory, and that persons residing within the same do not acquire the civil and political privileges, nor do they become subject to the civil duties and obligations, of inhabitants of the towns within which such territory is situated.”

Proceeding to some cases in which the State, in granting cession to the United States, had made particular reservations not necessary to be here discussed, the court then state their conclusions as follows :

“1. We are of opinion that persons residing on lands purchased by, or ceded to, the United States, for navy yards, forts, and arsenals, where there is no other reservation of jurisdiction to the State than that above mentioned, are not entitled to the benefits of the common schools for their children in the towns in which such lands are situated.

“2. We are of opinion that such residence does exempt such persons from being assessed for their polls and estate, to state, county, and town taxes, in the towns in which such places are situated.

“3. Understanding, as we do, by the terms of this question, that the term ‘legal inhabitancy’ is used synonymously with ‘legal settlement,’ for the purpose of receiving support under the laws of the Commonwealth for the relief of the poor, we are of opinion that such residence, for any length of time, will not give such persons, or their children, a legal inhabitancy in such town.

“4. We are also of opinion that persons residing in such territory do not thereby acquire any elective franchise as inhabitants

Exterritoriality of Military Sites.

of the towns in which such territory is situated. (Opinion S. C. Massachusetts, i Metcalf, p. 580.)

These authorities are express and complete as to the general doctrine, and as to its applicability to the United States Armory at Springfield. The Armory at Harper's Ferry exists under the same conditions.

I am not aware, on the other hand, of any legal authority, which contradicts those herein cited to the point of the complete extritoriality of places held by the United States for military uses, with assent of the State in which they lie. It seems to me, to be the plain reading and signification of the Constitution.

In my opinion, therefore, the persons in the employment of the United States, actually residing in the limits of the Armory at Harper's Ferry, do not possess the civil and political rights, nor are they subject to the tax and other obligations of citizens of the State of Virginia.

The privilege of not paying taxes in such a case, is a personal one of the party claiming it, and not, like the exemption of the property of the United States from taxation, a right of the Government as such, which it would be the duty of the Government to maintain.

If the local authorities should undertake by force to levy a tax on property within the limits of the Armory, it might possibly be proper for the United States to defend their jurisdiction against what would be, in my opinion, a manifest act of trespass.

I cannot but think, however, that the local authorities will, on mature reflection, see the inexpediency of any such course, and desist from a claim forbidden by the Constitution.

I am, very respectfully,

C. CUSHING.

Hon. JEFFERSON DAVIS,
Secretary of War.

Extra Pay of Clerks in the Departments.

EXTRA PAY OF CLERKS IN THE DEPARTMENTS.

The separate duties of the several clerks in the Departments, except where they are specifically designated in particular cases by statute, are assigned to such clerks by the Head of the Department; and no posterior claim to extra compensation can be founded on the official acts done by a clerk, provided those acts constituted any part of the lawful general duties of the Department.

ATTORNEY GENERAL'S OFFICE,

June 25, 1854.

SIR: I find on revising the files of my office a letter from your predecessor, (Mr. Everett,) of the 6th of December, 1852, submitting to my predecessor, certain claims of Mr. Edward Stubbs, which case remains to be disposed of.

Mr. Everett refers particularly to a letter of Mr. Mechlin, enclosing papers in explanation of the claim, and to a letter from Mr. Stubbs to Mr. Clayton; and submits the question, "Whether the allowance of the claim, in whole or in part, would be lawful."

The letter to Mr. Clayton, dated April 17th, 1849, refers to the disbursement by Mr. Stubbs, while a clerk in the Department of State, during the years "from 1842 to 1848 inclusive," of certain indemnities received by the United States under the treaty of 1834, the gross amount which passed through his hands being stated by him at \$355,803, and for which service he claims extra compensation in the form of a per centage commission; and he further states that he has transmitted to the Fifth Auditor "an account for these and other disbursements of indemnities, &c., received from foreign governments," to be submitted to the Department of State.

On examining the papers filed, it will be perceived that two distinct accounts were transmitted by Mr. Stubbs to the Fifth Auditor.

One of these accounts is dated "April, 1849," without number of day, and is in the following words and figures, namely:

"The United States In account with Edward Stubbs, Dr.
For disbursement of public moneys out of funds not necessarily connected with the agency of the Department of State previous

 Extra Pay of Clerks in the Departments.

to the 3d of March, 1839, and from 1st January, 1840, to 23d August, 1842, viz. :

For contingent expenses of foreign intercourse,	\$185,865.49
Revision of former census, ...	1,000.00
Fifth census, ...	140,918.60
Expenses of intercourse with the Barbary powers, ...	24,723.85
Expenses of commission under convention with France, ...	6,450.99
Expenses under convention with Spain, ...	1,316.31
“ “ “ Denmark, ...	197.79
“ “ “ Mexico, ...	1,076.20
“ of agency at Havana, ...	1,752.86
“ consulates in the Turkish dominions, ...	16,121.02
“ sixth census, ...	304,101.39
“ expl. and survey of North Eastern boundary, ...	5,010.12
“ of Missions abroad, ...	1,336.71
“ publishing foreign correspondence, ...	16,142.52
	\$706,013.85

At 2½ per cent., \$17,650.34.

E. and O. excepted. April, 1849.

Signed,

EDWARD STUBBS.”

The other account is as follows :

“The United States in account with Edward Stubbs, Dr.,

For the apportionment and disbursement of moneys received from foreign governments as indemnities for citizens of the United States, or refunded as being erroneously charged by the former against the latter.

Mudding duties refunded by Denmark ; (the first

for which accounts were submitted by the Fifth

Auditor,) (1837,)	\$1,596.35
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Do. 2d do. (1842,)	112.97
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Indemnities from Texas, for brigs “Pocket” and

“Durango,” (1840,)	10,865.00
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Indemnities from Chile, for brig Warrior, 1843-4, ...	8,651.49
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 Extra Pay of Clerks in the Departments.

Indemnities from New Granada for schooner "By Chance," 1844, ...	876.33
Indemnities from Spain, under a secret arrangement, after the infraction of the Convention of 1834, 1842 to 1849, inclusive, ...	356,103.00
Harbor money refunded by Norway, erroneously charged, ...	118.00
	\$378,323.14

At 2½ per centum, \$9658.08."

"An account for the above, rather less in amount was presented to the Fifth Auditor, on the 17th of April, 1849, was by him referred to the Secretary of State, and as I have been verbally, but not officially informed, by him rejected. See Secretary of State's letter to Fifth Auditor."

Accompanying this last account is also a letter from Mr. Stubbs to the Fifth Auditor, dated April 17th, 1849, purporting to refer "an account of moneys disbursed by me during my connection with the Department of State, being indemnities received from foreign governments for citizens of the United States."

There is apparent confusion of these two accounts, and in the references to them; for the letter to Mr. Clayton speaks only of the "disbursement of the Spanish indemnity from 1842 to 1849, inclusive," and mentions nothing else, while each of the accounts contains other matters, and covers a longer period of time. Besides which, the memorandum, at the foot of the unstated account accompanying the letter to the Fifth Auditor of April 17th, 1849, speaks of another account "rather less in amount," as having been "presented to the Fifth Auditor, on the 17th April, 1849;" but the only other account filed is of blank April, 1849, and instead of being less, is in fact double in amount.

On the face of the papers, therefore, and without further explanation, it is necessary for me, in order to dispose of the case, to consider both of the accounts, each of which covers a much longer period of time than appears from the letter to Mr. Clayton.

Extra Pay of Clerks in the Departments.

In fact, the letter of Mr. Mechlin, to which attention is called by Mr. Everett, argues the case of Mr. Stubbs, not merely as a claim for commissions from 1842 to 1849 on the Spanish indemnity, but on other disbursements also similar in character, going back to 1831, and thus making the whole account cover a period of more than seventeen years.

It appears that, during all that time, Mr. Stubbs was a salaried clerk in the Department of State, the duty assigned to him as such clerk being that of "disbursing agent" of the Department.

The letter to Mr. Clayton shows that Mr. Stubbs had just then been displaced, and afterwards preferred the claim for extra compensation.

No evidence is produced to show that while in office as clerk, and making these disbursements from year to year, and regularly receiving the salary allowed to him by statute, Mr. Stubbs claimed any extra compensation, or excepted to receiving the statute salary as his whole legal due, or pretended any right to retain commissions out of the moneys which he received and disbursed.

Nor is evidence produced, or suggestion made, that any of the successive Secretaries of State during the period covered by this claim, either Mr. Forsyth, or Mr. Webster, or Mr. Upshur, or Mr. Calhoun, or Mr. Buchanan, knew of the existence of such a claim; and the presumption is plain, that they all regarded the disbursement of these moneys, in common with other lawful disbursements, as belonging to his ordinary and proper duty as a clerk in the Department.

Now, it must be the strongest possible case of legal right, which could justify the reopening the compensation account of a clerk under such circumstances, and allowing him additional compensation. For no clerk having such a claim ought to lie by seventeen years without preferring it. Each annual or quarterly settlement of account during all that time is an implied waiver of any claim to additional compensation. If it had been claimed, the Secretary would have settled the question: he would have allowed it in part or in whole, or he would have augmented the salary, or he would have utterly rejected the

Extra Pay of Clerks in the Departments.

claim, and have rendered the renewal of it impossible, either by express contract with the party, or by dismissing him and appointing another clerk in his place.

Mr. Stubbs now claims extra compensation for extra services. But there is no law defining his duties, by which to discriminate what is regular and what extra, and therefore the range of his duties must be inferred from those provisions of the Constitution and of acts of Congress, which define the powers and duties of the Executive.

The executive power of the Government is vested by the Constitution in the President of the United States.

It being physically impossible, however, that he should perform in person all the executive duties of the Government, the Constitution anticipates that the public business will be distributed among "Executive Departments," conducted by "Heads of Departments," whose constitutional power is included in, and a delegated part of, that of the President.

For the same reason, it being physically impossible that each Head of Department should perform in person all the business of his Department, the Constitution and the laws allow him to appoint clerks, among whom a portion of his duties may be distributed, and whose legal power is included in his, just as his own is included in that of the President.

On these premises are the Executive Departments organized, a certain number of clerks being assigned to each, for the most part the several clerks not having duties specially prescribed by law, but performing such lawful acts as may, from time to time, be assigned to them by their departmental head, within the scope of the functions assigned to the latter by express law or by the lawful order of the President of the United States.

The Department of State, (first called the Department of Foreign Affairs,) was established by the acts of 27th July, 1789, (i Stat. at Large, p. 28, chap. 4, and p. 68, chap. 14,) whereby it is enacted "that the Secretary of the Department shall perform and execute such duties as shall, from time to time, be enjoined on, or intrusted to him by the President of the United States agreeable to the Constitution, relative to correspondences, communications, or instructions to, or with public ministers or

Extra Pay of Clerks in the Departments.

consuls, from the United States, or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers, or other foreigners, or to such other matters respecting foreign affairs as the President of the United States shall assign to the said department; and furthermore, that the said principal officer shall conduct the business of the said Department in such manner as the President of the United States shall, from time to time, order or instruct."

Hence, the duties of Mr. Stubbs as a clerk in the Department of State, not being specially defined by law, must have been such as the Head of the Department, acting under the orders or instructions, express or implied, of the President of the United States, should from time to time lawfully assign to him, or require him to perform.

The presumption is that Mr. Stubbs, in making the disbursements stated in his account, was performing the official duties thus assigned to, or required of him, as clerk in the Department of State, by the Head of the Department. That presumption is not repelled by anything produced by Mr. Stubbs, and is fortified by the consideration that those disbursements all appertained to the foreign relations of the United States, and were comprehended, therefore, in the legal duties and business of the Department of State.

There is no occasion to quote the several treaties and acts of Congress under which the disbursements, for making which Mr. Stubbs claims extra compensation, were made. It is self-evident on the accounts that all of them are matters within the province of the Department of State, and which the Secretary might well assign to the disbursing agent of the Department.

It is no answer to this to say that Mr. Stubbs drew and disbursed the salaries and other ordinary expenditures of the Department, unless he show that by express contract or assignment he was to receive his salary for these acts alone. This he does not do. And the disbursements, which he seeks to treat as not legitimately coming within his duties, were just as much a part of the proper business of the Department, as those which he assumes to consider as ordinary disbursements. No such distinction can be admitted in the business of the Departments.

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It is wholly immaterial to the present question whether a thing happens every day or only once in the history of the Government. The question is not of the frequency or periodicity of their occurrence, but what is their nature. There is not the slightest foundation or reason for pretending that a thing is unofficial, or extra official, merely because it comes up rarely, or casually, or once only, or under a particular treaty, or act of Congress, or order of the President or Head of Department. The quality of the thing, and that alone, is to determine whether it be within the duty of a particular officer of the Government.

It is mere delusion of language to speak of the disbursement of these indemnities as "not legitimately coming within the sphere of his duty as disbursing agent of the Department proper." It would be just as reasonable for one of the corresponding clerks to speak of a letter concerning this branch of the public business as "not legitimately coming within the sphere of his duty" as corresponding clerk "of the Department proper," and to claim extra compensation for writing or copying it.

These general conclusions are in my judgment decisive against the whole claim.

But, in addition to this, the claim is disposed of by a series of prohibitory acts of Congress.

The first of these statutes was enacted April 20th, 1818, (Stat. at Large, vol. 3, p. 445-447, chap. 87.) Section 1 authorized the Secretary of the Department of State "to employ one chief clerk, whose compensation shall not exceed \$2000 per annum; two clerks whose compensation shall not exceed \$1600 each; four clerks whose compensation shall not exceed \$1400 each; one clerk whose compensation shall not exceed \$1000; two clerks whose compensation shall not exceed \$800 each; one Superintendent of the Patent Office whose compensation shall not exceed \$1500; and one clerk in said Patent Office whose compensation shall not exceed \$1000."

Section 9 enacts—"And no higher or other allowance shall be made to any clerk in the said Department and offices than is

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allowed by this act: And all acts and parts of acts inconsistent with the provisions of this act are hereby repealed."

The second statute was passed 3d March, 1839, (v Stat. at Large, p. 349, chap. 82, sec. 3,) enacting "That no officer in any branch of the public service, or other person, whose salaries or whose pay or emoluments is or are fixed by law and regulations, shall receive any extra allowance or compensation in any form whatever, for the disbursement of public money, or for the performance of any other service, unless the said extra allowance or compensation be authorized by law."

The third approved 18th May, 1842, (v Statutes at Large, p. 487, chap. 183, sec. 2,) provides that no allowance shall be made for any extra services whatever, which any clerk or other officer may be required to perform.

The fourth, passed 23d August, 1842, (v Stat. at Large, p. 510, chap. 183, sec. 2,) enacts "That no officer in any branch of the public service, or any other person whose salary, pay, or emoluments is, or are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatsoever, unless the same shall be authorized by law, and the appropriation therefor explicitly set forth that it is for such additional pay, extra allowance, or compensation."

The fifth, passed 26th August, 1842, (v Stat. at Large, p. 525, chap. 202, sec. 12,) enacts "That no allowance or compensation shall be made to any clerk or other officer, by reason of the discharge of duties which belong to any other clerk or officer in the same or any other department; and no allowance or compensation shall be made for any extra services whatever, which any clerk or other officer may be required to perform."

Each of these statutes comprehends the services, which Mr. Stubbs was required by the Secretary of State to perform in relation to these disbursements, he being a clerk in the Department of State, upon a salary fixed by law, and without any regulation of the Department to allow him other compensation.

Mr. Mechlin argues that the Spanish and other indemnities are not "public money," either because they did not proceed

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from appropriations by Congress, or because they were payable to individuals. But there is nothing in this distinction. That is "public money," which is disbursed by and for the Government. It is wholly immaterial where it came from or to whom it goes. (*Broome v. United States*, xv How. 143.) It was lawfully possessed by the United States in execution of a treaty, and therefore was, for the present purpose, public money, just as much as if it had been received into the Treasury from taxes, and received by Mr. Stubbs to be disbursed for the salaries of the Secretary and his clerks, or of the diplomatic agents of the United States.

Mr. Mechlin also argues for Mr. Stubbs that the Spanish indemnity money having been, as he says, paid by Spain to the Secretary of State, and disbursed by him secretly, and not paid to the Secretary of the Treasury as originally contemplated or provided by law, takes it out of "the sphere of his duty as disbursing agent of the Department." The assumed premises of fact are not accurately stated, but if they were it is immaterial. Mr. Stubbs was the disbursing agent of the Department of State. Whatever the Department as such had to disburse, fell within his legitimate and official duty as the agent of the department.

Indeed, if it were permissible by special pleading to set up these artificial distinctions between the different branches of the duty of a clerk, and to found thereon a claim for extra compensation, there would be an end for ever of all statute limitations of salaries in any of the departments.

This claim does not profess or pretend to be founded on an express promise of the Government, but upon an assumpsit to be implied, to pay for services what they were worth, and that two and a half per cent. upon the moneys disbursed is a reasonable compensation. To this end are cited for the claimant, *United States v. Nourse*, vi Peters, 470; *United States v. Ripley*, vii Peters, 18; *United States v. Fillebrown*, vii Peters, 28.

The case of Mr. Nourse shows that he was Register in the Treasury Department, the duties of which office are clearly defined by law. Besides the duties of Register, Mr. Nourse was

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employed by the Government to perform the duties of the following agencies, in which the accounting officer of the Treasury struck the following balances against him in 1829, viz:

As agent of the joint library committee of Congress,	\$2,502.55
As agent for paying the expenses of stating and printing the public accounts,	934.98
As agent for paying the superintendent and watchmen of the buildings occupied by the State and Treasury Departments,	1,325.41
As agent for paying the expenses of printing certificates of the public debt,	1,011.29
As agent for paying the contingent expenses of the Treasury Department,	5,994.90
Amounting in the whole to	\$11,769.13

Mr. Nourse, in rendering his accounts, had charged a commission of two and a half per cent. on all the moneys which had passed through his hands under the different agencies above specified, which the accounting officers refused to allow, thereby making a difference of \$21,137.06 between the accounts of the Treasury and the accounts of Mr. Nourse, and thereby, instead of a balance in favor of Mr. Nourse, upon the accounts rendered by him, of \$9,367.37, the accounting officers brought him in debt to the Government, and struck the balance against him as late Register, in the manner and in the particulars as before stated. For the balance so produced, a distress warrant was issued. Mr. Nourse obtained an injunction. On the hearing, the proper judge of the United States for the District of Columbia, referred the accounts to three auditors, to ascertain and report the reasonable value of the services as agent, which Mr. Nourse had performed over and above his duties as Register. The auditors reported that his said services, mentioned in the interlocutory order, were reasonably and equitably worth at the rate of $2\frac{1}{2}$ per cent. on the various sums disbursed to the amount of \$940,308.83, making the sum of \$23,582.72, "and the said services are equitably worth the said last-mentioned sum."

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On the final hearing, the district judge, reciting the report of the auditors, and that no sufficient reasons had been presented to the court against the confirmation of that report, decreed a perpetual injunction to stop further proceedings against the complainant Nourse on the account, and warrant of distress.

From that decree the attorney for the United States appealed to the Circuit Court, and from that to the Supreme Court of the United States, wherein the appeal was dismissed, because the act of Congress, which authorized the application to the District Courts for relief against warrants of distress, did not authorize an appeal from the decrees of the District Courts. (vi Peters, 495.)

In this case, the law defining the duties of the Register of the Treasury, compared with the account of the Government, as stated, and showing the services which Mr. Nourse had performed, and for which he had retained moneys, plainly showed that the services for which he had retained the moneys were distinct from, and unconnected with, his official duties as Register.

In the case of Ripley, (vii Peters, 25,) the doctrine stated by the court is,—“It is presumed that every person who has been engaged in the public service, has received the compensation allowed by law, until the contrary shall be made to appear. * * * * * If the disbursements made, for which compensation is claimed, were not such as were ordinarily attached to the duties of the office held by the defendant, the fact should have been so stated; and also that the service was performed under the sanction of the Government, or under such circumstances as rendered the extra labor and responsibility assumed by the defendant in performing it, necessary. * * * * *

It is clear that an equitable allowance should be made * * * * * for extra services performed by an officer which did not come within the line of his official duty, and which had been performed under the sanction of the Government, or under circumstances of peculiar emergency.”

In Fillebrown's case, (vii Wheaton, 31) it appears that Fillebrown held, at the same time, two offices, one as clerk in the Navy Department, with a salary fixed by law, the other as clerk

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to the Board of Commissioners of the Navy Hospital Fund, with a salary of \$250 per year. He was also appointed agent of the Board of Navy Commissioners, to collect and disburse the Navy Pension Fund, with a distinct understanding that he was to have compensation therefor.

The evidence, and the points in the bills of exception, are clearly stated in the opinion of the court, (vii Peters, 42 to 50,) wherein it is said—"From the testimony it is very clear that Mr. Southard (the Secretary of the Navy) considered the agency of the defendant in relation to the fund as entirely distinct from his duty as Secretary, (of the board,) and that he was to have an extra compensation therefor. * * * It was, therefore, an express contract entered into between the board or its agent and the defendant; and it was not in the power of the board, composed even of the same men, after the service had been performed, to rescind the contract and withhold from the defendant the stipulated compensation." * * * *

"The contract was that Fillebrown should receive compensation in the mode and according to the practice of the Government in other and similar cases."

The general usage of the different Departments of the Government, in allowing commissions to the officers of Government upon disbursements of money under a special authority not connected with their regular official duties, was permitted to be given in evidence; and twenty-seven accounts settled at the Third Auditor's Office were exhibited, containing allowances of commissions on disbursements in such like cases. To this evidence the Attorney for the United States objected, the court admitted the evidence, and exception was taken to such ruling on the objection.

Upon this exception, the Supreme Court decided that the evidence was properly admitted; "It was not for the purpose of establishing the *right*, but to show the *measure* of compensation, and the manner in which it was to be paid."

There is another case in which the defendant was allowed by the court and jury, extra compensation which had been rejected by the accounting officers of the Treasury: the United States *v.* McDaniel, vii Peters, 1 to 17.

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McDaniel was a clerk in the Navy Department, and was also employed as agent for the disbursements of the Department in paying navy pensions, privateer pensions, &c., for ten or fifteen years, during which he had been allowed for such special agency, by Secretaries Crowninshield and Thompson, one per cent. upon his disbursements; and his accounts, charging such commission, had been so adjusted and settled: he was continued in such agency, and continued to charge the commissions in his accounts and to retain so much. But upon the coming in of a new Secretary, who gave a different construction to the act of 1804, (Stat. at Large, vol. 2, p. 297, chap. 53,) the commissions for the defendant's past services, charged in his unsettled accounts, were rejected, by which he was made a debtor to the Government in the sum of \$988.96.

Upon this case, the Supreme Court of the United States said: "The defendant having acted as agent for navy disbursements, for a great number of years, under different Secretaries, and having uniformly received one per cent. on the sums paid, as his compensation, he continues to discharge the duties and receive the compensation, until a new Head of the Department gives a different construction to the act of 1804, by which those duties are transferred to the Commander of the Navy Yard. By this new construction, whether right or wrong, no injustice is done to the defendant, provided he shall be paid for services rendered under the former construction of the same act. But such compensation has been refused him." (vii Peters, 14.)

* * "The head of a department * * * is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law, but it does not follow that he must show a statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate by law the minute movements of every part of the complicated machinery of government, would evince a most unparadonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done that can neither be anticipated nor deferred, and which are essential to the proper action of the Government."

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Hence, of necessity, usages have been established in every department of the Government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits. And no change of such usages can have a retrospective effect, but must be limited to the future. * * * *

“In this manner were these payments made for fifteen years under different Secretaries of the Navy, and the same rule of compensation as now claimed was allowed. The charge was sanctioned by the accounting officers of the Treasury Department, and no objection was ever made to it by the committees of Congress, who annually inspected the books of the Department.” * *

“For more than fifteen years the claim has been paid for similar services, and it is now too late to withhold it for services actually rendered. It would be a novel principle to refuse payment to the subordinates of a department because their chief, under whose direction they had faithfully served the public, had mistaken his own powers, and had given an erroneous construction of the law. But the case under consideration is stranger than that. It is not a case where payment for services is demanded, but where the Government seeks to recover money from the defendant to which he is equitably entitled for services rendered.”

These extracts suffice to show that the services, for which extra compensation had been retained by McDaniel, were different from his duties as a clerk in the Navy Department, and had been so considered and so compensated for fifteen years, by former Secretaries of the Navy, before the new Head of the Department gave a new construction to the act of 1804. And that new construction was not suffered, by the court, to act retrospectively so as to deprive McDaniel of his extra compensation for services previously rendered: although the accounting officers of the Treasury had refused to allow it under the new construction.

In the case of *Gratiot v. The United States*, (iv Howard, 80-96-117,) the court refused to allow extra compensation, because, “taking all the evidence, and construing it the most favorably for the defendant, (Gratiot,) none is adduced showing,

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or tending to show, that the defendant performed any service not appertaining to his station as chief engineer."

In the case of *Obadiah B. Brown v. The United States*, and *The United States v. Obadiah B. Brown*, (ix Howard, 487,) the claim of Mr. Brown for extra compensation was rejected by the court, because the services, for which extra compensation was claimed, were not over and above, and unconnected with, his official duties as chief clerk and treasurer of the Post-office Department.

The cases of *The United States v. McDaniel*, vii Peters, 1; *Same v. Ripley*, vii Peters, 25-26, and *Same v. Fillebrown*, vii Peters, 44, having been cited for the defendant Brown, the Supreme Court said,—“Between those cases, and that now before us, we can discern an obvious distinction. Without undertaking here to discuss the force of those decisions as authority upon this question, we may safely say that they were commended to the judgment of this court by the conviction that they were founded on services, which appertained not to the regular official stations and duties of the claimants;—services, too, actually performed, and untinged by any hue or shade of contrivance or *mala fides*, and really beneficial in their character to those for whom they were performed. But whatever may have been understood to be decided, or whatever, in truth, may have been actually decided, by the cases above mentioned, the principles established by this court in the decisions of *Gratiot v. The United States*, iv Howard, 80, and of *The United States v. Buchanan*, decided January term 1850, (vii Howard, 102,) are considered as furnishing the true rule as to allowances for extra services.” (ix Howard, 500.)

The seven cases before cited, viz., *Nourse's case*, vi Peters, 470; *McDaniel's case*, vii Peters, 1; *Ripley's case*, vii Peters, 18; *Fillebrown's case*, vii Peters, 44; *Gratiot's case*, iv Howard, 80; *Buchanan's case*, viii Howard, 83, and *Obadiah B. Brown's case*, ix Howard, 487, all concur in establishing the principle, that to enable a salaried officer to recover extra compensation for services rendered to the Government, it must be made to appear that the services, for which extra compensation is claimed, “were not such as were ordinarily attached to the duties of the

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office held," but were performed under "a special authority not connected with his regular official duties; or under such circumstances as rendered the extra labor and responsibility assumed by the officer in performing it necessary."

When an officer has received the compensation allowed him by law, it is presumed he has received his dues "until the contrary shall be made to appear." (*United States v. Ripley*, vii Peters, 25.)

The general usage of the different Departments of the Government, in allowing commissions to the officers of Government upon disbursements of money under a special authority not connected with their regular official duties, cannot be received to establish the *right* of the officer to additional compensation over and above his salary, but only as to the *measure* of compensation, when the right to extra compensation is established, the amount of compensation being uncertain, and the question being how much the services were reasonably worth. (*Fillebrown's Case*, vii Peters, 37 and 50; *Buchanan's case*, viii Howard, 102-104.)

The Heads of Departments, in the exercise of the discretionary powers incident to their duties and the business of their respective departments, may, in cases not forbidden by law, make equitable allowances to officers for special services directed to be performed by the Head of the Department, and not connected with regular official duties. (*McDaniel's case*, vii Peters, 4 and 5, 14 and 15; *Fillebrown's case*, vii Peters, 31, 36 and 37, and 46.)

Whether the services for which extra compensation is claimed were, or were not, of the regular duties ordinarily attached to the duties of the office held by the claimant, is a question of law to be determined by the court. (*Gratiot's case*, iv Howard, 117.)

When these doctrines come to be applied to the case of Mr. Stubbs, it is apparent that they exclude his claim. The disbursement of the moneys in question was not wholly alien to legally defined duties, like the disbursements made by Register Nourse. It was a thing comprehended by any and every possible definition of "the line of his official duty," to repeat the

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expression of the court in Ripley's case. It was not a case like Fillebrown's, of commission expressly contracted for and allowed for a series of years, by the Head of the Department. Nor had Mr. Stubbs been receiving the commission for fifteen years, as in the case of McDaniel. But even those cases do not appear to have been satisfactory, on reflection, to the court, who, in the later cases of Gratiot, Buchanan, and Brown, are very careful to define, more exactly than they had in the other cases, the true rule of law applicable to such matters, the imperfect statement of which in the earlier adjudications had led to misconceptions.

Upon the whole, Mr. Stubbs does not, in my opinion, show anything whereon to ground an assumpsit by the United States, either express or implied, to pay him any compensation over and above his salary as a clerk in the Department of State.

Mr. Stubbs disbursed with integrity, for a number of years, the funds of the Department of State, and has recently been restored to his place, knowing which, I have examined his case with care, and stated in full the reasons which induced me to think that there is no law to justify the allowance of this claim by the accounting officers of the Government.

I am, very respectfully,

C. CUSHING.

Hon. WM. L. MARCY,
Secretary of State.

SCIENTIFIC COLLECTIONS BY PUBLIC OFFICERS.—INDICTABILITY
OF PUBLIC OFFICERS.

All collections of objects of natural history and the like, and all field-notes or other like local information, taken or obtained by any public officer, civil or military, *in the line of his duty*, belong to the Government.

But officers of the Government, civil or military, may lawfully make collections and take notes for their own use, provided the same be done without neglect of public duty or expense to the Government, and provided also, that it be done without violation of superior order in their respective departments.

Public officers are indictable at common law for acts of malfeasance in office committed in the District of Columbia.

ATTORNEY GENERAL'S OFFICE,

June 26, 1854.

SIR: Your note of the 23d of November last escaped my attention at the time.

It states that "certain persons," while officers of the Department, and under pay from the Government, and in their official capacity, made collections of valuable scientific and other information, and prepared papers thereon, which they intend to withhold from the Government and use for their own private benefit or emolument.

And you, therefore, inquire whether there is any law for the punishment of such officers criminally?

I am not aware of any act of Congress, which specifically provides for the punishment of public officers, generally, on account of misfeasance in office.

They are of course impeachable by the Constitution; and most of them are subject to removal from office at the discretion of the President.

In some of the States there is statute provision as to their own officers; but those statutes do not extend beyond their own jurisdiction, and of course do not apply to officers of the General Government.

It is a rule of the common law so called, that is, the common law of England, that any public officer is indictable for misbehavior in his office. The doctrine is thus laid down in the best modern authors:

"Where an officer neglects a duty, incumbent on him either by common law or by statute, he is indictable for his offence; and this, whether he be an officer of the common law, or appointed by act of Parliament; and a person holding a public office under the King's letters patent, or derivatively from such authority, has been considered as amenable to the law for every part of his conduct, and obnoxious to punishment for not faithfully discharging it." (i Russell on Crimes, ed. 1853, p. 135.)

And a public officer is punishable for misfeasance in his office, though no injurious effects result to any individual from his acts; for the crime consists in the mere fact of the perversion

of powers committed to him for the honor as well as the advantage of society. (Wharton's *Crim. L.*, ed. 1852, p. 731.)

Conspicuous examples occur in modern times of the criminal prosecution of public officers.

For instance, in Great Britain, the case of *The King v. Holland*, a member of the Council of the Presidency of Madras. (v D. & E. 607.)

So in the State of New York, the case of the *People v. Brooks*, a justice of the peace. (i Denio, p. 437.)

Under the laws of the United States there being no statute authorizing the indictment of officers of the United States for misbehavior, they could not be indicted, except at common law, and in those parts only of the United States where the common law obtains as a source of criminal jurisdiction.

There is no principle of the common law, which pervades the Union and exists independently of the State. (Lermand v. Clark, ii McLean's C. C. R. 568.) There is no common law of the United States. (Wheaton v. Peters, viii Peters, 591.)

Hence, the Federal courts have no jurisdiction of common law offences against the United States. (U. S. v. Hudson, vii Cranch, 32; U. S. v. Coolidge, i Wheat. 415.)

The District of Columbia is an exception to this doctrine; for the act of Congress of 1801, for organizing the District, provides: "that the laws of the State of Virginia, as they now exist, shall be and continue in force in that part of the District of Columbia, which was ceded by the said State to the United States, and by them accepted for the permanent seat of government; and that the laws of the State of Maryland as they now exist, shall be and continue in force in that part of the said District which was ceded by that State to the United States, and by them accepted as aforesaid." (ii Stat. at Large, p. 103.)

The declaration of rights of the State of Maryland expressly enacts: "That the inhabitants of Maryland are entitled to the common law of England." (Art. 3.)

The effect of the article is, that the common law of England enters into the common law of Maryland, even as a source of criminal jurisdiction. (*The State v. Buchanan*, v H. & J., p.

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317; *Dashell v. Attorney General*, v H. & J. 410; *The State v. Bank of Maryland*, vi G. & J. 205.)

Of course, in the whole of the District of Columbia, as it now is since the retrocession of a part of it to Virginia, (act of July 9th, 1846, ix Stat. at Large, p. 35,) the common law of England, so far as received in Maryland in 1801, is in full force. (*McKenna v. Fiske*, i Harr. 241.)

Accordingly, indictments at common law are a fact of ordinary occurrence in the District of Columbia. (See *United States v. Brockett*, ii Cranch. C. C. R. 441; *United States v. Pompey*, Ibid. p. 446; *United States v. Cowing*, Ibid. vol. ii, p. 608, 613; *United States v. Rogers*, Ibid. vol. iii, p. 618; Ibid. p. 620.)

In my opinion, therefore, an officer of the United States is indictable for any misbehavior in office, committed in the District of Columbia.

It does not appear from your statement whether the acts referred to were committed in this District; nor can it be determined, without more specific information, whether they constitute misfeasance in office.

If the precise official duty of the party was to collect information on objects of science for the Government, and he diverted the same to his own use;—or if he had other official duties, which he neglected in order to make collections for his own use and profit;—or if he made unlawful use of the funds of the Government to procure objects of value for himself;—in either of these suppositions, he would have been guilty of misfeasance in office. On the other hand, if, without neglecting any official duty, or misapplying the public funds or other property in any way, he merely availed himself of official opportunities to obtain information or make useful scientific or other collections,—then he would only have done what it is lawful and proper for any honorable public officer to do. In order to form a precise judgment on those points, more full explanation is needed as to the acts inculcated.

I am, very respectfully,

C. CUSHING.

Hon. R. McCLELLAND,
Secretary of the Interior.

Power of the President.

POWER OF THE PRESIDENT.

An act, within the jurisdiction of the President of the United States, lawfully done by him, cannot be revised by one of his successors.

ATTORNEY GENERAL'S OFFICE,

June 30, 1854.

SIR: I have duly considered the question presented by your communication of the 12th of November last, which happened to be mislaid in my office until recent application brought it to my notice.

It appears that by the treaty between the United States and the Choctaw nation of Indians, of Dancing Rabbit Creek, and the supplement, signed 28th September, 1850, (vii Stat. at Large, p. 340,) the Choctaw nation ceded to the United States all their land east of the Mississippi river, with reservations therefrom of parcels in favor of various persons, and in these words, as respects the question on hand:

“And to each of the following persons half a section of land is granted on any unoccupied and unimproved lands in the districts where they respectively live, to wit: * * * James D. Hamilton, (and others therein named.)

“All of said last-mentioned reservations are to be located under and by direction of the President of the United States.”

On the 29th of January, 1844, application was made to locate this reservation of James D. Hamilton on S. $\frac{1}{2}$ of section 31, in township 30, of range 2, west in the Choctaw cession, which was approved by the President of the United States on the 9th of March, 1844, upon information furnished by the Commissioner of the General Land Office, “that up to November 3d, 1843, no disposition appeared from the records of this office to have been made of the tract by the United States.”

Subsequently to this approval by the President, an application was made to the Commissioner of the General Land Office, by the Commissioners appointed by the State of Mississippi, to select the lands for the school fund of that State, to have this tract of land, upon the allegation that they had selected it before it had been located for James D. Hamilton.

It is claimed as having been located for the school fund of the State of Mississippi, under the act of 13th of June, 1842, (v Stat. at Large, p. 490, ch. 40,) which is an amendment of the act of 4th of July, 1836, (same vol. p. 116, ch. 355.)

The 2d section of the act of 1836, enacted:

“That there shall be reserved from sale, in the State of Mississippi, a quantity of lands, equal to one-thirty-sixth part of the lands ceded by said Chickasaws as aforesaid, with said State of Mississippi, which shall be selected, under the direction of the Secretary of the Treasury, in sections or half sections, or quarter sections, out of any public lands remaining unsold, that shall have been offered at public sale, within either of the land districts in said State of Mississippi, contiguous to said lands within said State, so ceded by the Chickasaws as aforesaid; which lands, when so selected as aforesaid, the same shall vest in the State of Mississippi, for the use of schools within said Territory in said State, so ceded as aforesaid by the Chickasaws.”

The act of 1842 enacts, that so much of the second section of the act of 1836, “as requires the land to be therein designated as reserved to the State of Mississippi for the use of schools, to be selected under the direction of the Secretary of the Treasury, out of any public lands remaining unsold, that shall have been offered at public sale within either of said land districts in said State of Mississippi, contiguous to said lands within said State, ceded by the Chickasaws, be so amended that the said lands may be selected under the direction of the Governor of said State of Mississippi, out of any public lands remaining unsold within either of the land districts in said State of Mississippi, contiguous to the lands in said State ceded by the Chickasaw Indians.”

It would seem that these lands of the Choctaw cession were contiguous to those ceded by the Chickasaws.

The facts in regard to the selection of this land by the State of Mississippi, seem to be the following:

On the 26th of June, 1843, commissioners, acting under the direction of the Governor, selected this parcel of land, among

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others, in virtue of the act of 1842, above mentioned, and furnished the Register of the Land Office in Grenada, with a list of the lands selected. On the 29th of the same month, the Register rejected these selections, for reasons set forth in his letter of that date to the Governor. At what precise time the State appealed from this rejection, does not appear; but the action of the President leads to the conclusion that it had not then been done in March, 1844, when he approved the location made by Hamilton.

Afterwards, however, on the 26th of May, 1844, by virtue of instructions from the Commissioner of the Land Office of the 2d of the same May, the selections made under the authority of the Governor, including the land located by Hamilton, were admitted by the Receiver.

The representatives of Hamilton now apply for a patent in conformity with the location approved in 1844, by the President.

Upon these facts, the question is propounded for my opinion, "Whether the President has now the power to revoke an approval made by his predecessor, without an application to that effect from the representations of the locator under the treaty?"

The answer to this question depends upon another one, namely, whether, by the approval of the President, Hamilton acquired a vested interest in the land located.

That approval by the President was not an opinion but an act, the execution of a power conferred on him by the treaty of Dancing Rabbit Creek.

The principle, which would allow a matter *done* to be re-examined and reversed by a successor in office, would equally allow the reversal to be reversed by a successor in office, and so in endless succession of reviews and reversals.

It is well said by Mr. Attorney General Toucey—"There is no law which authorizes the Head of any Department to supervise the *acts* of his predecessor. * * * It might well be asked, which of the two high functionaries, exercising the same authority, would, in contemplation of law, be deemed to be in the right, the one who, at a proper time, and on a proper occasion,

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exercised his legitimate authority, according to his best judgment, or the one who undertook to go back into a past stage of administration, and to revise and reverse the *acts* of his predecessor, whose power was equal and identical with his own?"

By parity of reasoning, an act done by one President of the United States, vesting a right in a citizen, is not subject to review and reversal by his successor; for if it were, there would be no stability or security for any rights of property acquired under the action of the Government.

A selection made by the State of Mississippi under the direction of the Secretary of the Treasury, according to the act of 1836, would have passed a vested right to the State. But a selection made by the Governor, according to the act of 1842, would not of itself divest the right of the United States, nor until ratified and approved by the proper Department of the Government. If that had been done before the act of the President approving Hamilton's location, then the right would have vested in the State. But the previous approval, by the President, of Hamilton's location, had the effect of vesting the right in Hamilton.

Undoubtedly, if it had appeared on investigation, that the title had vested in the State of Mississippi before the act of the President approving Hamilton's location, then no interest would have accrued to Hamilton by reason of that approval; the patent might have been vacated and annulled by process in the courts of law; (*Ladigar v. Rowland*, ii Howard, 581; *Gaines v. Nicholson*, ix Howard, 356; *Godfrey v. Beardsley*, ii McLean, 412;) and it might have been reversed by any subsequent President as for a mere mistake. But, as there was no such mistake, and the interest did therefore in fact vest in Hamilton, it seems to me that the President of the United States has no lawful authority to revoke the act of his predecessor President Polk.

The only effect of this conclusion is, that the State of Mississippi will have to select another tract of land, in place of this; which, as appears from the letter of the Commissioner of the State, filed with me as an additional paper, this day, the State

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is entirely ready and content to do, so as to save any further controversy on the subject.

I am, very respectfully,

C. CUSHING.

Hon. ROBERT McCLELLAND,
Secretary of the Interior.

ENLISTMENT OF MINORS IN THE ARMY.

The Secretary of War is not under obligation by law to discharge minors from the Army on the application of alleged parents or guardians not domiciled in the United States.

ATTORNEY GENERAL'S OFFICE,
July 19, 1854.

SIR: I have received your letter of the 7th instant, and considered the question therein propounded.

The question is, whether the Secretary of War is required by law to discharge persons from the Army who, when enlisted, were minors, and then having parents or guardian, who "were aliens and not residing in the United States at the time of enlistment?"

The Constitution of the United States is framed upon the principle that native allegiance is not perpetual, but may be renounced, under certain circumstances.

The laws of the United States authorize recruiting officers to enlist aliens, minors, and apprentices into the army; and upon enlistment, each and every recruit is required to take an oath "to bear true allegiance to the United States of America," &c. That is to say, the law of the United States has conferred the capacity upon minors within the United States to enlist and to take the oath of allegiance to the United States.

The act of 20th January, 1813, (ii Stat. at Large, p. 792, chap. 12, sec. 5,) enacted "that no person under the age of twenty-one years shall be enlisted by any officer, or held in the service of the United States, without the consent, in writing, of his parent, guardian, or master, first had and obtained, if any he have."

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The act of 10th December, 1814, (iii Stat. at Large, p. 146, ch. 10,) enacts that the recruiting officers are authorized to enlist into the Army of the United States "any free, effective, able-bodied man, between the ages of eighteen and fifty years, which enlistment shall be absolute and binding upon all persons under the age of twenty-one years, as well as upon persons of full age."

Sec. 2d. That the recruiting officer shall not deliver any clothing, or pay any bounty to a recruit under twenty-one years of age, or in any manner restrain him, for four days next after his enlistment, during which time the recruit may withdraw his enlistment.

Sec. 3d repeals so much of the act of January 20, 1813, "as requires the consent, in writing, of the parent, guardian, or master, to authorize the enlistment of persons under the age of twenty-one years," and in case of an enlisted apprentice, divides the bounty and the pay of the apprentice between him and his master in certain proportions and rates, graduated by the length of the unexpired time of the apprentice's service.

The act of the 28th of September, 1850, (ix Stat. at Large, p. 507, ch. 78, section 5,) makes it the duty of the Secretary of War "to order the discharge of any soldier of the Army of the United States who, at the time of his enlistment, was under twenty-one years of age, upon evidence being produced to him that such enlistment was without the consent of his parent or guardian."

These acts, being *in pari materia*, are to be taken and construed together, to find the intention of the legislature.

Attorney General Crittenden, in his opinion of March 28th, 1851, (vol. v of Opinions, p. 313,) decides that the Secretary of War is not bound by said act of 1850 "to discharge a minor who, at the time of enlistment, had neither parent nor guardian;" that the minor having a parent or guardian, and enlisting without consent, is not entitled, during his minority, to make proof and claim his own discharge. The parent or guardian must concur in the application to discharge the minor. The minor, as a soldier, is fed, clothed, and paid by the United States. He is in lawful service, without expense to his parent

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or guardian, and the law gives the enlisted minor himself no capacity during his minority to revoke the enlistment so lawfully entered into.

The question propounded to Attorney General Crittenden did not lead him to discuss the case of a minor, enlisted within the United States, having at the time a parent or guardian, who was an alien not residing in the United States, and whose authority, as parent or guardian, over the minor above eighteen years, but under twenty-one years of age, depended upon a foreign law.

The question now stated relates to minors enlisted into the Army of the United States under the authority of our own laws, but who are said to have had, at the time of enlistment, parents or guardians, respectively, who are aliens, and not residing in the United States.

The privileges and disabilities of persons, arising from their age, are to be determined by the particular laws of the place or nation where the business is transacted.

The laws of every country belonging to the great Christian Commonwealth of nations, are considered as having, in general, force within its limits, and all persons within the limits of such government are considered as subject to its laws, whether their residence there is permanent or temporary.

The laws of no nation have force directly and *proprio vigore* within the territory of another nation of Christendom. Whatever effect is allowed to the laws of one Christian people within the territory of another Christian people is *ex comitate*, not of right, and that comity is never extended so far as to occasion a prejudice or inconvenience to the rights of the government or its citizens, of whom such comity is asked.

It is true that no Christian government allows its people to be subject to the jurisdiction of governments not Christian. For instance, citizens of the United States in Turkey, or in China, are wholly exempt from the local jurisdiction, and are amenable only to the minister or other authorities of the United States.

But the local jurisdiction prevails among all the nations associated by the combined ties of the Greek and Roman civiliza-

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tion, and the Christian religion, except only in certain limited cases of extra-territoriality under the *jus gentium*, which are not material to the present question.

By our own laws, persons under the age of twenty-one years, if of the age of eighteen years, may lawfully be enlisted into the Army of the United States, and such contract of enlistment was absolute and binding upon those under the age of twenty-one, as fully as upon the recruits over twenty-one years of age by the act of 10th December, 1814.

The act of September 28th, 1850, directs the Secretary of War to discharge any soldier who, at the time of his respective enlistment, was under twenty-one years of age, upon the production of evidence that such enlistment "was without the consent of his parent or guardian." Taking the acts of 1813, 1814, and 1850, together, as being in *pari materia*, and as explanatory of the meaning and intent of the legislature, the fair construction and proper conclusion seem to be that, at the time of the enlistment, the minor must have had a parent or guardian, whose authority as such over the person of the enlisted minor was known and recognised as valid by the law of the place where the enlistment was made, and who, as parent or guardian, had authority to consent or to forbid, and to whom the recruiting officer might have applied within the United States for his assent, in writing, to the proposed enlistment of such minor.

How can the inhabitants of the United States ascertain the condition, privileges, and disabilities of persons dwelling among them, if they are to be determined, not by our own laws and institutions, but by reference to foreign laws,—to the place of birth, or to the place in which the father, or the mother after the death of the father, may have acquired domicils other than the birthplace of the enlisted soldier, acquired before he came to the United States or afterwards, and before enlistment in the Army of the United States?

By the civil law, full age was not attained until the age of twenty-four years. By the old French law, full age was twenty-five; by the Spanish law, full age is twenty-four. Full age in some parts of Germany is attained at eighteen; in others, at

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twenty-one; in others, at twenty-five. In England, Scotland, and Ireland, full age is attained at twenty-one. (Story's Conflict of Laws, sec. 51, note 2, p. 65.)

There is much diversity of law in different countries as to the powers and authorities of a parent over his child, modified also by the questions whether the child is legitimate, illegitimate, or legitimated; and as to the powers and authorities of a guardian over his ward, and how long the powers and authorities of the parent or of the guardian over the child or the ward shall continue, and under what circumstances, and at what age, they shall cease; and the status of the minor is to be determined in each case by the particular laws of the country of the birth, or of the domicile acquired by the father, or by the mother after the death of the father, in a country other than the birthplace, or of the particular country wherein the child or ward may be residing.

How are the inhabitants of the United States, the recruiting officers, and the Secretary of War, to determine the powers and authorities claimed by the parent or guardian of an enlisted soldier, if they are to be ascertained by foreign laws?

I conceive that the law of 1850 before cited must be understood as alluding to the authorities and powers of parents and guardians of the minor and enlisted soldier as known to and recognised by the laws of the State or Territory of the United States, where the contract of enlistment was entered into. For, in such cases, to give effect to foreign laws would be attended with great inconvenience and prejudice to the rights of the Government of the United States and its citizens.

Parents or guardians, who, by virtue of the laws of the country of their domicile, claim rights, powers, and authorities over the persons and actions of their children or wards, must keep them within the jurisdiction of the country of such domicile. If they suffer their children or wards to come into the United States to seek livelihood by personal exertions, they remaining at their domicile in foreign countries, they must be considered as having emancipated such children or wards. If such emancipated children or wards enlist in the Army of the United States, or are bound to service as minors and paupers, or contract any

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other engagements which the laws of the place of their sojourn authorize, such engagements are not to be broken up at the will of a parent or guardian, desiring to resume a power, authority, or right which he has so released.

What the law protects it may regulate.

An alien within the United States is under the protection and regulation of the local law of the place where he sojourns, and of the laws of the United States.

If a foreigner sends his property within a jurisdiction different from that of his domicil, he submits it to the laws, rules, and regulations of the country wherein he places it. (*Olivier v. Townes*, xiii Martin's Loui. Rep., p. 97 to 103; *Lamb v. Durant*, xii Mass. Rep. 54; *Lanfear v. Sumner*, xvii Mass. Rep., p. 10; *Norris v. Munford*, iv Martin, p. 20-25; *Thuret v. Jenkins*, vii Martin, p. 353; *Price v. Morgan*, vii Martin, p. 707.)

If the person of the child or the ward be in one country, and the parent or guardian remains at his domicil in another country, the parent or guardian cannot claim to extend the law of the foreign domicil into the country in which the child or ward is resident, by whose laws he is protected, and to whose laws he is subject, when by such extension the laws, policy, and interests of the latter government would be infringed. For example: By the laws of the ancient Romans, the father had the power of life and death over his children. Suppose a Roman father had sent his child to a country not subject to the Roman law, to Germany, the father could not have gone into Germany and there exercised the power of putting his child to death; for the Roman law had no force in Germany, and the child there would be under the protection and regulation of its laws, and not those of Rome.

The claims of powers and authorities by parents and guardians, in virtue of the laws of foreign countries wherein they are domiciled, over their children, or wards, who are in the United States, are of no more force than the claims of foreign administrators to property within the United States, in opposition to the claims of the domestic administrators.

Over and above the perplexities, uncertainties, and inconve-

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niences, which the Secretary would have to encounter in attempting to administer the various foreign laws in such cases of enlistment, the door would be opened to aliens residing out of the United States to send their minor children or wards into the United States, or to suffer them to come here, to enlist in the Army of the United States, in order to receive the bounty, the rations, the clothing and pay, until the foreign guardians or parents should think fit to claim the enlisted soldiers as being enlisted without their consent "in writing," or until the enlisted soldiers themselves, after attaining their full ages, respectively, should apply to be discharged, because enlisted without the consent "in writing" of their respective alien parents or guardians, so domiciled out of the United States.

The nature and extent of the powers and authorities of foreign parents and guardians over the persons of their children or wards, and over their property and acquisitions, are subjects of difficulty, about which eminent jurists disagree. (See Story's Conflict of Laws, sections 25 and 26, p. 36, 37, and section 455, p. 760.)

When we refer to foreign laws for the powers of a guardian over the person of his ward,—how the guardianship shall be appointed or constituted,—and when it ceases,—we are involved in still greater difficulties and perplexities, and conflicting opinions of jurists. (Story's Conflict of Laws, chap. xii, sec. 494, p. 835, to sec. 506, p. 855.)

In the diversities of human affairs and jurisprudence, many laws must exist in one country, which are the result of local or peculiar circumstances, and are unfit to be introduced into the institutions or usages of another nation. The jurists of Europe have, with labor, skill, and acuteness, endeavored to collect principles, which ought to be carried into execution everywhere by all nations. But they have failed to agree. They have attempted to define and fix that which, in the nature of things, cannot be defined and fixed. The extent, to which the comity of one nation towards other nations can be permitted is, and ever must be, uncertain. No nation can be expected to suffer the laws of another nation to interfere with her own to the prejudice of its citizens and its rights and policy.

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There is one general rule about which there is no controversy: the laws of every country have direct obligation within the limits of its government, but not beyond those limits; any extra-territorial effect must be of courtesy only.

Resting on this general and undoubted principle, we should be led to understand the act of Congress, which directs the discharge of any soldier, who, at the time of his enlistment, was under the age of twenty-one years, upon evidence "that such enlistment was without the consent of his parent or guardian," as having reference to a parent or guardian then domiciled in the United States, and deriving his powers and authorities from our own laws and institutions, State or Federal, and not from and under foreign laws.

Foreign laws are not judicially noticed. They are facts to be proved and ascertained by juries with the assistance of the court. Commissions to take proof of a foreign law may be granted by the court in a pending controversy. Then the interests and vigilance of the adverse parties will act as safeguards against imposition and false testimony. The Secretary of War cannot send commissions and agents for the taking, and for supervising the taking, of proof of foreign laws in relation to the powers and authorities of parents and guardians, the validity of the appointments of guardians, and whether the children were born in lawful wedlock, or legitimated, or are illegitimate. If he is to depend upon *ex parte* proof of foreign laws offered to obtain the discharge of soldiers as having been enlisted into the Army of the United States without the consent of their parents or guardians, domiciled in foreign countries, and deriving their powers and authorities over the persons of the enlisted soldiers under foreign laws, the Government of the United States would be subjected to great inconveniences, and exposed to losses by falsehood and fraud.

Viewing the several acts of Congress in *pari materia* as explanatory of the intention of the legislature, and considering the very great inconveniences to which the Government of the United States and its citizens would be exposed, if the act of Congress of 1850 should be construed as implicitly

Noah Hansen's Case.

adopting, in relation to the powers and authorities of parents and guardians over the persons of their children and wards, the laws of every foreign nation on this globe from which an emigrant shall come into the United States, and there enlist into the Army, my opinion is that, in order to the exercise of the rights conferred by that act, the parent or guardian must be domiciled in the United States at the time of the enlistment of the soldier, deriving the powers and authorities of a parent or guardian from our own institutions and laws, either State or Federal, as the case may be, and not from foreign laws.

Alien parents and guardians not residing in the United States, whose children or wards are within the United States, and willing to enlist in the Army, cannot be, and are not required to be, consulted by the recruiting officers, for assent, in writing, to the proposed enlistment.

I am, very respectfully,

C. CUSHING.

Hon. JEFFERSON DAVIS,
Secretary of War.

NOAH HANSON'S CASE.

Whether the President can lawfully discharge a prisoner confined for non-payment of a penalty accruing as indemnification to the individual injured by the prisoner's act, *dubatur*.

ATTORNEY GENERAL'S OFFICE,

July 19, 1854.

SIR: I have the honor to report herewith on the case of Noah Hanson's application for pardon.

Hanson, a free colored man, residing in the District of Columbia, at the March term of the criminal court of the District, in the year 1851, was convicted of the offence of harboring two slaves, with a view to their escape, contrary to the acts of the State of Maryland in force in the District, and sentenced to pay a fine of \$1080, one half to the use of the Hon. William

Noah Hanson's Case.

T. Colcock, the owner of the slaves, and the other half to the use of the United States.

Hanson being unable to pay this penalty, was committed to prison in default thereof, and has so remained until the present time.

In February, 1853, application was made to the President for the pardon of Hanson, and refused.

The application is now renewed under the following circumstances :

At the March term of the criminal court for the District, in the year 1849, Daniel Drayton was convicted of the offence of abducting seventy-four slaves from the District, and sentenced to the payment of a fine of \$140 and costs for each slave, the penalty to enure one half to the owners of the slaves and one half to the United States. At the same term, Edward Sayres was also convicted of the offence of abducting seventy-four slaves, and sentenced to pay a fine of \$180 and costs in each case, the penalty to enure as above stated. These were white men. In default of payment, they were committed and so remained until the 9th of August, 1852, when they were pardoned by the President.

It seems unjust that a colored man, misled by sympathy of race, being of inferior intelligence to the white men, and guilty of a far less offence both in the relation of moral obliquity and of actual injury to private interests done or attempted, should continue in prison after the discharge from imprisonment of the white violators of the law and intermeddlers with the peace of the District.

The pardon granted to Drayton and Sayres was a qualified one, leaving them subject to the pecuniary obligation, but released from imprisonment as the means of enforcing its payment, in conformity with an opinion of my predecessor, (Mr. Crittenden,) of August 4th, 1852, (*Ante*, vol. v, p. 579.)

I have heretofore had occasion, in the case of the ships *Bellona* and *Enterprise*, (*Ante*, p. 488,) to express doubts as to the authority of the President to remit a penal forfeiture accruing to individuals. The case of a release from imprisonment as the means of enforcing the payment of such a forfeiture,

Power of Consuls.—Liabilities of the United States.

presents a different question, but one which is not wholly free from difficulty.

The present case, however, is relieved from all embarrassment by the fact that in a letter filed, Mr. Colcock generously expresses his cheerful acquiescence in whatever you may think fit to decide in this matter, and waives all personal objections to a pardon.

I perceive, therefore, now, no legal objection to a qualified pardon in this case, and advise that, for the reasons before suggested, it be granted according to the form adopted in the cases of Drayton and Sayres.

I am, very respectfully,

C. CUSHING.

To the PRESIDENT.

POWER OF CONSULS.—LIABILITIES OF THE UNITED STATES.

Consuls have no authority to order the sale of a ship in a foreign port, either on complaint of the crew or otherwise.

If, on such sale, a consul retains money for the payment of seamen's wages, he acts at his own peril, and is responsible to the owners.

The United States are not responsible in damages for moneys illegally received by consuls, or for any other act of malfeasance of theirs in office.

ATTORNEY GENERAL'S OFFICE,

July 24, 1854.

SIR: Your letter of the 12th instant calls for my opinion of the acts of February 28th, 1803, and July 20th, 1840, in relation to the powers and the duties of consuls of the United States, as applied to the case of the bark "Serene," sold by order of the consul at Acapulco.

This act of February, 1803, (ii Stat. at Large, p. 203, chap. 9, sec. 3,) makes it the duty of the master or commander of a ship or vessel belonging to a citizen of the United States, which "shall be sold in a foreign country, and her company discharged, * * * to produce to the consul or vice-consul * * * the list of his ship's company, certified as aforesaid, and to pay to such consul or vice-consul, * * * for every seaman or

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mariner discharged, being on such list as a citizen of the United States, three months' pay, over and above the wages which may then be due to such mariner or seaman, two thirds thereof to be paid by such consul * * * * to each, seaman or mariner so discharged, when, &c., * * the other remaining third to be retained for the purpose of creating a fund for the payment of the passages of seamen or mariners, citizens of the United States, who may be desirous of returning to the United States, and for the maintenance of American seamen, who may be destitute, and may be in such foreign port,"—the same to be accounted for every six months with the Secretary of the Treasury.

The act of July 20th, 1840, entitled "An act in addition to the several acts regulating the shipment and discharge of seamen and the duties of consuls," (Vol. v. of Stat. at Large, p. 396, chap. 48, article 12th,) provides, "If the first officer, or any officer, and a majority of the crew of any vessel shall make complaint in writing that she is in unsuitable condition to go to sea, because she is leaky or insufficiently supplied with sails, &c., or the crew is insufficient to man her, or that her provisions are not or have not been during the voyage, sufficient and wholesome, thereupon the consul or commercial agent, in any of these or like cases, shall appoint two disinterested, competent, practical men, acquainted with maritime affairs, to examine into the causes of complaint, who shall in their report state what defects and deficiencies, if any, they find to be well founded, as well as what ought to be done, in their judgment, to put the vessel in order for the continuance of the voyage."

Art. 13th gives the inspectors full power to examine the vessel, and also to hear and receive any other proofs, and the consul, upon view of the report of the inspectors so appointed, may approve the whole, or any part of the report. If he approve he shall so certify; if he dissent, he shall certify his reasons for so dissenting.

Art. 14. "The inspectors in their report shall also state whether, in their opinion, the vessel was sent to sea unsuitably provided in any important or essential particular, by neglect or design, or through mistake or accident, and in case it was by neglect or design, and the Consul or other commercial agent ap-

Power of Consuls.—Liabilities of the United States.

proved of such finding, he shall discharge such of the crew as require it, each of whom shall be entitled to three months' pay in addition to his wages to the time of the discharge; but if, in the opinion of the inspectors, the deficiencies found to exist have been the result of mistake or accident, and could not in the exercise of ordinary care have been known and provided against before the sailing of the vessel, and the master shall, in a reasonable time, remove or remedy the causes of complaint, then the crew shall remain and discharge their duty; otherwise they shall, upon their request, be discharged, and receive each one month's wages in addition to the pay up to the time of discharge."

By the papers accompanying your letter, it appears that the American bark "Serene," Phineas Windsor, master, of 332½ tons burthen, sailed from San Francisco, in the State of California, on the 23d of March, 1854, for San Blas, in the Republic of Mexico, laden with a cargo of quicksilver, thence, after discharging her cargo, she sailed to Ypala, in that republic, and there took in a full cargo of Brazil wood, and thence cleared and sailed on the 2d of May, bound for Valparaiso, in Chile. The vessel at sea sprang a leak on the 6th of May, and put into Acapulco in distress.

There, the master went before the American consul, Charles L. Denman, and made declaration and protest of all the circumstances; which protest and declaration was also verified by A. D. Stagg, first officer, T. W. Pinkham, carpenter, Charles Foy, Thomas Tilson, and John Chalet, seamen.

On the 12th of May, the first and second mates, the carpenter, and said three seamen, presented to the consul their petition in writing, requesting him to appoint a survey and examination of said vessel, and to take such action thereon as is provided by law.

The captain deposed that the said petitioners composed two-thirds of the officers and crew of his said vessel the "Serene."

Thereupon the consul appointed C. Hayward, a sea captain, Thomas Campbell, a ship carpenter, and Lorenzo Pratt, a pilot, to examine into the condition of said vessel, &c., and make report.

They reported that after discharging the cargo, the leak was

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below the water line, the result of heavy seas, without fault of the officers or crew; that the vessel must be stripped, hove down, and her copper taken off, in order to a thorough examination and repair; that even if she could be repaired in the port of Acapulco, the expense of the delay would exceed the value of the vessel; but that she could not be repaired in that port. And the said examiners and inspectors advised that the vessel be sold for the benefit of all concerned, and that measures be taken for the safety of the cargo: all which was sworn before the consul, who certified his approval of the report on the 20th of May, 1854. The vessel was accordingly sold at auction on the 22d of May, 1854, *by order of the consul*, and produced the sum of \$1332.68.

The vessel being so sold, in this foreign port, the consul paid out of the proceeds to the crew, (whose wages were stated at so much per month in the shipping articles), viz: To the first and second mates, the carpenter, and the five seamen, who composed the crew, the sum of \$286.77, for their wages up to the 22d of May, 1854,—and took their receipts, severally,—to the master, as paid by the consul;—and the consul furthermore gave his receipt to the master for the sum of \$495, for three months' wages to the first and second mates, to the carpenter, and to seaman Chalet, they being the only American citizens of the ship's roll; besides which the consul paid the various expenses of the survey of the vessel and sale in the port of Acapulco, amounting, in wages and expenses, to the full proceeds of the sale.

There was insurance upon the vessel, but none on the cargo. The assurers refuse to pay the wages, because, they say, no wages were earned by reason of the disaster before the vessel arrived at Valparaiso, whereby the voyage was broken up,—the vessel being condemned and sold, by order of the consul, and not by voluntary abandonment and sale by the master.

Thereupon the master inquires—

1st. Whether the wages were due?

2d. Whether the Government will refund the money illegally received by the consul?

1. The first question is divisible—1st, as to the wages upon

Power of Consuls.—Liabilities of the United States.

the voyage from the port of San Francisco to the port of San Blas; 2d, as to the wages on the voyage from San Blas or Ypala to Valparaiso.

Seamen in merchant ships are usually hired at a certain sum, either by the month, or for the voyage. In the former mode, the sum of wages depends upon the length of the voyage; in the latter case it is fixed invariably without regard to the duration of the voyage. In this case, it appears the sum of wages depended upon the duration of the voyage, being rated by the month.

The general rule is that the wages of seamen on board of merchant ships are payable out of the earnings for freight; and if no freight is earned by reason of the perils of the sea, or capture by the enemy, and not by the fault or neglect of the master or owner, no wages are due. Freight is the mother of wages. (*Hernaman v. Bawden, &c.*, iii Burr. 1844; *Abernethey v. Sandale*, ii Douglass, 542.)

But it seems to be settled that, where a voyage is divided by various ports of delivery, a claim for proportional wages attaches at each of such ports of delivery, upon safe arrival, and that all attempts to evade or invade that title, by renunciations obtained from the mariners without any consideration, by collateral bonds, or by contracts inserted in the body of the shipping articles, not usual, not fully explained to these illiterate and inexperienced persons, are ineffectual and void. (*Anonymous*, 1 Ld. Raym. 639, and also *Anon.*, Ibid. 739; *Comyns' Dig.*, Merchant, (F. 2,) 4th edit. vol. v, p. 56; the *Two Catharines*, 2 Mason's Circuit Court Rep. 319-329; *Thompson v. Faussat*, 1 Peters' Cir. Ct. Rep. 182; Judge Winchester's Decisions, reported in note to *Relf v. The Maria*, 1 Peters' Admiralty Rep. 186; *Crammer v. Gernon*, 2 Peters' Adm. Rep. 390; *Kent's Comm.* vol. iii, p. 190-191, Lecture 46; *Abbott on Shipping*, part iv, chap. 2, p. 417, and note 2; *Moore v. Jones*, xv Mass. Rep. 424; *Hooper v. Perley*, xi Mass. Rep. 545; *Swift v. Clark*, xv Mass. Rep. 173.)

The principles of these decisions entitle the crew of the "Serene" to wages up to the time she sailed from Ypala, after having discharged her cargo to San Blas.

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But they were not, because of the voyage to Valparaiso being broken up, entitled to wages from and after the time the vessel sailed from Ypala.

Next, as to the three months' wages, charged because of the proceedings and sale so ordered by consul at Acapulco.

The act of the 28th of February, 1803, applies only to voluntary sales by the master in foreign ports, or by the owners, and not to a case where a sale is rendered necessary by a shipwreck. (*The Dawn*, Ware, 488; *Pool v. Welsh*, Gilpin, 193; *Abbott on Shipping*, p. 193, note 1; *The Saratoga*, 2 Gallison, 181.

In its 12th, 13th, and 14th articles, the act of 20th July, 1840, applies to a case where a vessel, having arrived at a foreign port, is about to sail thence on another or continuous voyage, and the crew apprehend that their lives will be endangered because of her unsuitable condition to go to sea, and make complaint to the consul of such intention to go to sea in an improper and unsuitable condition,—“because she is leaky; or insufficiently supplied with sails, rigging, anchors, or any other equipment; or that the crew is insufficient to man her; or that her provisions, “stores and supplies are not, or have not been during the voyage, sufficient and wholesome.” Upon complaint in any of these or like cases, the consul shall appoint fit persons “to examine into the causes of complaint;” to examine the vessel, and whatever is on board, and to receive any other proof. The examiners are to state whether, in their opinion, “the vessel was sent to sea unsuitably provided in any important or essential particular, by neglect or design.” If the inspectors find any complaint “well founded;” they are to state what ought to be done “to put the vessel in order for the continuance of her voyage.” They have no authority to report a sale; the crew have no authority to ask a sale; this act gives no authority to the consul to order a sale of the vessel.

By the 14th article of this act, if the examiners report that “the vessel was sent to sea unsuitably provided in any important or essential particular, by neglect or design,” and the

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consul approves of such finding, "he shall discharge such of the crew as require it. In such case of neglect or design, the crew, discharged upon such ground, are each entitled to three months' pay, in addition to his wages up to the time of the discharge."

If the deficiency complained of by the crew is reported by the examiners to have been "the result of mistake or accident, and could not, in the exercise of ordinary care, have been known and provided against before the sailing of the vessel, and the master shall in a reasonable time remove or remedy the causes of complaint, then the crew shall remain and discharge their duty." But if the master does not, in a reasonable time, remove or remedy the causes of complaint, then the crew shall, upon request, be discharged; and in this latter case they shall receive each "one month's wages in addition to the pay up to the time of the discharge."

This act has not deprived owners and masters of vessels of the right to consult their own interests, in selling or not selling; it has not subjected vessels to consular orders of sale because of such vessels having, in their voyages, sprung a leak and put into the nearest port for safety.

It intends to redress the just complaints of the crews of vessels in foreign ports against being compelled to risk their lives in vessels about to go to sea in unsuitable, unsafe conditions; to hear and redress the just complaints of mariners against being exposed to peril by the neglect or design of masters and owners, or by their mistakes or accidental omissions. If the complaint exhibited to the consul, upon examination, is found to be just and to have been the result of neglect or design, then the mode and measure of redress are pointed out, the crew may be discharged from further service, and have three months' pay in addition to his wages up to the time of discharge." If the complaint is found to be true, but to have been the result of mistake or accident, the act points out the mode and measure of redress. "The master shall in a reasonable time remove or remedy the causes of complaint, and then the crew shall remain and discharge their duty. But if the master shall not in a reason-

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able time remove or remedy the causes of complaint, then the crew, upon their request, shall be discharged, "and receive each one month's wages in addition to the pay up to the time of discharge."

The powers of the consul are confined to the examination of complaints of the crew against the master, as that he is about to take the crew to sea in a vessel, which is "in an unsuitable condition to go to sea, because she is leaky or insufficiently supplied" with sails, rigging, &c.—"or that the crew is insufficient," or that her "provisions, stores, and supplies are not, or have not been, during the voyage, sufficient and wholesome." The powers of the consul extend no further than to discharge the crew with their extra wages in addition to the pay up to the time of discharge.

That a vessel is about to sail out of port in a leaky condition, is a just cause of complaint by the crew, which the master may be directed to remove or redress in a reasonable time; but it is no just cause of complaint against master or owners that, by the straining of the vessel in heavy seas, she has sprung a leak.

Upon due examination of this act, it cannot be tortured into an authority to the crew of a vessel to lodge complaint against the master, because the vessel has sprung a leak, by reason of her laboring in heavy seas, and has, therefore, to put into the nearest port for safety.

In this case, the crew themselves deposed before the consul that the leak was caused at sea, while the vessel was on her voyage, by heavy rolling seas, and "not to be attributed to any insufficiency of the said bark, or default of him the said master, his officers and crew." And yet, after these affidavits before the consul, showing the cause of the disaster, and why the vessel could not proceed to Valparaiso, but was by distress compelled to put into the harbor at Acapulco, the consul entertained the mere application of the crew for a survey to examine into the condition of the bark, without a solitary complaint against the master or owners; and after the examiners had reported that the leak "was the result of, or occasioned by, heavy seas, and that no fault can be attributed to her officers or

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crew, as she appears to have been well provided with all things necessary for her voyage," the consul ordered a sale of the vessel at auction; and then distributed the proceeds, all of which, by his account rendered, were swallowed up by expenses and three months' wages to the crew in addition to their pay to the time of the sale.

The act of 1840 does not change the general principle of the maritime law, that seamen's wages are not due for a voyage not performed, when no freight has been earned, when the voyage has been broken up by a disaster at sea, and when no fault is attributable to the master or owners.

Nor did it put it into the power of the crew, when the vessel was obliged by a leak, caused by the straining of the vessel in heavy rolling seas, to put into the nearest port for safety, and so disabled from continuing the voyage until repaired, to complain of the master for such an event, cause the vessel to be sold, and thereby acquire profit to themselves by the payment of wages not earned, and the further advance of pay for three months to come.

In my opinion, therefore, the payment of wages by the consul to the crew for the time after the ship, having previously discharged her cargo at San Blas, sailed from Ypala, and down to the time of the sale, as also the detention of wages for three months in addition, was an illegal act.

Indeed, no power is given to the consul, by this act of Congress or any other, upon complaint of the crew or otherwise, to order a sale of the vessel, and it does not appear upon what authority he assumed so to do in the present instance.

Provision is made by the law or the regulations of most countries of Europe and America for the case of the ascertained unseaworthiness of merchant ships on a voyage, and the consequent jurisdiction of the consul for the disposition on security of the property, and the payment of wages due the seamen.

Thus the French "*Code de Commerce*," (art. 237,) while, in general, forbidding the master of a merchant vessel to sell her abroad unless he have a power of attorney from the owner, yet empowers him to do this, in case of the innavigability of

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the ship lawfully ascertained, and *with permission of the consul*. But it gives no power to the consul to order the sale *in invitum*. (Pardessus, Droit Commercial, tome vi, p. 260-261; Moreuil, Manuel des Agents Consulaires, p. 85-86.)

So, in the consular regulations of Denmark, the consul is authorized to make sale of a disabled ship when the owner has on the spot no agent or attorney, but not otherwise; and even then he must, if possible, send and obtain the consent of the owner. (De Cussy, Réglements Consulaires, p. 411.)

No act of Congress gives to an American consul power to make a forced sale of a ship, because of innavigability, except that of April 14th, 1792, which expressly excludes the authority of the consul to sell either ship or goods "when the master, owner, or assignee thereof is present or capable of taking possession of the same." (i Stat. at Large, p. 283.)

Upon the face of the documents, the sale was ordered by the consul as of his own authority. If so, it was wholly illegal, especially the master, who was part owner, being present. It was possible, however, that the master assented to, or by some writing not filed authorized, the sale; for it is a suspicious fact in this part of the case, that the papers do not show to whom the sale was made, and that, as already intimated, the several surveys, fees of consul, seamen's wages, and other charges, consumed all the proceeds of the sale in the hands of the consul.

As to these and the other acts of the consul, in so far as he may have exceeded his authority, the United States are not responsible:—excepting only that if, upon such forced sale of the vessel, caused by the consul, he has retained one-third of the wages of the seamen as a fund for the payment of the passages of seamen citizens of the United States desirous of returning to the United States, and for the maintenance of American seamen who may be destitute, as directed by the 3d section of the act of 28th February, 1803, in cases of voluntary sales of American vessels in foreign ports,—and if he shall have paid into the Treasury, or legally expended to the use of the United States, any portion of the money, so received by mistake and misconstruction of the law,—then such portion so expended to the use

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of the United States, ought to be refunded to the owners of the bark "Serene."

I am, very respectfully,

C. CUSHING.

Hon. WM. L. MARCY,

Secretary of State.

PROMULGATION OF INDIAN TREATIES.

Indian treaties are only required to be printed for promulgation in one newspaper, and that in the State or Territory to which the subject-matter of the treaty belongs.

ATTORNEY GENERAL'S OFFICE,

July 25, 1854.

SIR: Your communication of the 19th instant submits inquiry as to the authority or obligation of the Department of State to promulgate Indian treaties by publication in newspapers.

The act of 20th of April, 1818, (iii Stat. at Large, p. 439, ch. 80, sec. 1,) in its expressions, included Indian treaties, to be published in not more than three newspapers in each of the States and Territories, and in one in the District of Columbia.

Sec. 4 required the Secretary of State to publish, at the close of every session of Congress, eleven thousand copies of the acts of Congress at large, including resolutions, amendments to the Constitution, and all public treaties made and ratified since the then last publication of the laws, to be distributed as therein mentioned.

The act of 11th of May, 1820, (vol. iii, Stat. at Large, p. 576, ch. 92,) in sec. 1st, directed the Secretary of the Department of State, as soon as may be after he shall receive any order, resolution, or law, passed by Congress, *except such as are of a private nature*, to cause them to be published in a number of newspapers, not exceeding one in the District of Columbia, and in not more than three in each of the several States and Territories of the United States. "And he shall also cause to be published in like manner in said newspapers, all public treaties entered into and ratified by the United States, *except*

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Indian treaties, which shall be published only in one newspaper, and that to be within the limits of the State or Territory to which the subject-matter of such treaty shall belong."

Sec. 2d repeals the first section of the act of 1818, leaving in force the other seven sections, which regulate the price of newspaper publications, the number of copies in pamphlets, the distribution of them, &c., &c.

The act of 26th of August, 1842, sec. 21, (iv Stat. at Large, p. 527, ch. 202,) repeals the act of 20th April, 1816, "So far as the same authorizes or requires the laws, resolutions, treaties, and amendments of the Constitution of the United States, to be published in any paper or papers printed in the different States and Territories of the United States," "and in lieu thereof, it shall be the duty of the Secretary of State to publish such laws, resolutions, treaties, and amendments, in not less than two, nor more than four, of the principal newspapers published in the City of Washington for country subscribers, giving the preference," &c.

This act of 1842, while it expressly repeals so much of the act of 1818, as requires publication in the newspapers printed in the different States and Territories, contains no express repeal of any part of the act of May 11th, 1820.

But this 21st section of the act of 1842 is itself expressly repealed by the act of 8th August, 1846, "to provide for the more effectual publication of the laws of the United States," (ix Stat. at Large, p. 76, 77, ch. 101,) and the second section of this last act enacts, "That so much of the act * * * approved April 20th, 1818, as is *repealed* by the said *twenty-first section* be, and the same is hereby revived and continued in force; Provided, that the Secretary for the Department of State shall cause the publication of such laws, resolutions, treaties, and amendments, in two of the newspapers in the District of Columbia, and in each of the several States and Territories of the United States, and no more."

Now, the first section of the act of 1818, so revived, (and modified,) and the first section of the act of May 11th, 1820, and the two sections of the act of 1846, are to be considered together and construed as one act, they being in *pari materia*.

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Of course the "treaties," referred to in the act of 1846, are the "treaties" described in the previous acts, with all the qualifications attached thereto.

Congress, in repealing the 21st section of the act of 1842, did not repeal the first section of the act of 11th of May, 1820, but left it in full force; nor did the act of 1842, or any other act, either expressly or by implication repeal that first section.

It is not sufficient, for the purpose of establishing the repeal of a statute by implication, to show that the subsequent statute covers some, or even all, of the cases provided for in the former; for they may be merely affirmative, or cumulative, or auxiliary provisions; there must be a positive repugnancy between the provisions of a former and a subsequent statute, and even then the former law is repealed by implication only *pro tanto*, to the extent of the repugnancy. (*Wood v. United States*, xvi Peters, 362, 363; *Daviess v. Fairbairn*, iii Howard, p. 646; *Beale v. Hale*, iv Howard, p. 37.)

The direction in the act of 1842, to publish the laws, resolutions, treaties, and amendments of the Constitution in not less than two nor more than four of the newspapers printed in the city of Washington, did not repeal the express prohibition, in the act of 11th of May, 1820, against the publication in the newspapers, of the private acts and the Indian treaties. Such omission from the newspapers of private acts and Indian treaties comported with the intent and policy of the law of 1842 to diminish unnecessary expense of publication in the newspapers.

The negative of the act of 1820, the express prohibition therein contained, was not repealed by the mere affirmative provision in the act of 1842. The command of the act of 1820, to publish the orders, resolutions, and laws of Congress, and public treaties and amendments of the Constitution, in three newspapers in each of the several States, was repealed by the act of 1842, in directing that they shall not be published in more than four of the principal newspapers published in the city of Washington, &c. In that respect, and to that extent, the act of 1842 was repugnant to, and a negative upon, the

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provisions of the act of 1820, for publication in three newspapers in each of the several States and Territories.

But, in so far as the act of 1820 directs that private acts and Indian treaties shall not be published in the newspapers along with the other laws and treaties, but that Indian treaties "shall be published only in one newspaper, and that to be within the limits of the State or Territory to which the subject-matter of the treaty shall belong," it well stands with and is not repealed by the act of 1842, nor by the act of 1846.

Congress has not deemed it necessary to extend the publication of private acts and Indian treaties so widely by newspapers, as that of public acts and other treaties, which concern all citizens throughout all the States and Territories of the United States.

I am, very respectfully,

C. CUSHING.

HON. WILLIAM L. MARCY,
Secretary of State.

LICENSES IN TIME OF WAR.

A sea-letter, given to a foreign merchant vessel by the commander of a ship of war in time of war, does not convert such vessel into American property.
A Frenchman, commercially domiciled in the Mexican Republic, during the war between that Republic and the United States, who sailed his vessel under a license or letter of protection from the commander of an American ship of war, and who was afterwards prosecuted and subjected to loss on that account by the Mexican Government, cannot be redressed by the United States.

ATTORNEY GENERAL'S OFFICE,

July 25, 1854.

SIR: I have examined the papers in the case of Louis Vial referred to me, by your letter of the 8th instant.

Mr. Vial asks the Government of the United States to interpose, in his behalf, to obtain indemnification from the Mexican Government for alleged wrongs committed by the constituted authorities of Mexico on his person and property, under the following circumstances:

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Mr. Vial, a Frenchman, residing at La Paz in Lower California, at the time of the war between the United States and the Mexican Republic, owned a schooner called the *Mazatlan*, of thirty-seven tons burthen, which was lawfully captured by Commander Dupont of the United States' ship *Cyane*, and then released by him on ransom, and allowed to sail under a white flag and a certificate of ransom.

Afterwards, Mr. Vial obtained from Commodore William B. Shubrick, commanding the naval forces of the United States in the Pacific Ocean, the following letter dated March 30th, 1848, on board the United States' ship *Independence*, at Mazatlan, namely:

"In virtue of the authority in me vested as Commander-in-chief of the United States' naval forces in the Pacific Ocean, I do hereby grant to the schooner *Mazatlan*, owned and commanded by Don Louis Vial, a citizen of France and a resident of Lower California, this sea-letter, authorizing said schooner to trade under the flag of the United States, and to go to and from the ports and places now in possession of the enemies of the United States, and to engage in any lawful trade. The said schooner *Mazatlan* is of thirty-seven tons burthen."

It appears, as well by the statement of Commodore Shubrick, as by letters of Commander Dupont and of the Hon. Rodman M. Price, then Purser of the *Cyane*, that, in the concluding period of the war, Mr. Vial was of service in furnishing supplies or information to the United States.

Subsequently to this, and after the conclusion of peace between the two republics, Mr. Vial was in the port of Mazatlan, with his schooner, and he being on shore, on the 23d January, 1849, a part of the garrison revolted, seized their commander by force, put him on board of the *Mazatlan* in the night, and compelled the mate to sail for Acapulco. The vessel stopped, however, at Manzanillo, where the Mexican officer was landed, and the mate of the vessel made due protest of the facts before the officer of the port. Afterwards, the *Mazatlan* set sail to return to Mazatlan, and on her voyage was seized by a Mexican cruiser, carried into Mazatlan as prize, and there a prosecution was commenced against Mr. Vial, charged as having been accessory

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and an accomplice in seizing and carrying away the said Commandant of Mazatlan.

After the detention of Vial and his schooner for about four months and a half he was acquitted, set at liberty, and his schooner restored.

For loss of profits which the owner of the schooner alleges he could have made on the cargo, if not prevented from arriving in proper time at San Francisco, whither he had intended to go, he charges \$35,000, and for four and a half months' detention of the schooner Mazatlan, he charges at the rate of \$25,000 per month, making a claim for demurrage of \$112,500, the aggregate amounting to \$147,500. For this demand the claimant asks the interposition of the American Government for reclamation against the Mexican Republic.

Without stopping to remark on the apparently monstrous amount of the damages claimed, such as \$25,000 per month demurrage on a little schooner of thirty-seven tons burthen, and \$35,000 anticipated profits on her voyage from Mazatlan to San Francisco, and waiving all questions as to the foundation of the claim as against the Mexican Government, the only inquiry incumbent on me in the case is,—whether it is the duty or the right of the United States to interpose in the premises.

Stripped of all immaterial matters, the question of public law is this:

A Frenchman, commercially domiciled in the Mexican Republic, suffers loss, through acts of violence committed against him by revolted Mexican troops, or from a groundless prosecution in law, instituted by the public authorities, *de jure* or *de facto*, of the Mexican Government.

Upon such a case, in general, it would be a waste of words to argue, at length, that it devolves no duty, in respect to the party injured, and confers no right, on the United States.

On what pretence, then, is the United States to interfere in the case of Mr. Vial? Simply because, at a former period, during the war between the United States and the Mexican Republic, Commodore Shubrick gave to Mr. Vial the sea-letter above quoted. The ransom and white flag granted by Commander Dupont have no possible influence on the question.

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The capture of the *Mazatlan* by Commander Dupont, and the subsequent favors she received, all proceeded, and rightfully, upon the premises, that she was and continued to be enemy's property. (ii Wildman's Inter. Law, p. 84; Chitty's Law of Nations, p. 34; *The President, v Robinson's R.*, p. 277; *The Indian Chief*, iii Robinson's R. 12; *De Luneville v. Phillips*, ii New Rep. 97; *The Antonia Johanna*, i Wheaton, 159; Wheaton's Elements, p. 369.) The whole question, therefore, is of the legal effect of the sea-letter granted by Commodore Shubrick.

Now, it cannot be, it is not pretended, that this made Mr. Vial a citizen of the United States, or the schooner *Mazatlan*, owned by a Frenchman, a vessel of the United States. The foreign character, both of the schooner and of her owner, continued as much after this writing, as before.

Without this letter, the *Mazatlan*, belonging to a merchant domiciled in the Mexican Republic, and trading on the coast thereof, was subject, as we have seen, to be treated by the American cruisers as enemy's property. The letter could have no other effect than as a quasi license to trade during the war or until revoked, given to a vessel otherwise liable to capture and condemnation by the United States.

It is to be remembered that the seizure and detention of Mr. Vial's vessel at Mazatlan, which he complains of here, took place after the conclusion of the war, and the whole case proceeds on the assumption, that, by the sea-letter, the *Mazatlan* became American property, and he an American. Each of these premises must be and is assumed in the present application.

But Commodore Shubrick knew the laws of his country too well to suppose that he could, by his sole act and deed, convert the Frenchman, Louis Vial, into an American citizen, or the schooner owned by him, into a vessel of the United States of America.

Mr. Vial must be left to the consideration of the French Government. For the Government of the United States to interpose as he solicits, would be to perpetrate an act of offi-

Effect of Appeal Lost by Laches.

cious intermeddling with matters in which the United States have no concern.

I am, very respectfully,

C. CUSHING.

Hon. W. L. MARCY,
Secretary of State.

EFFECT OF APPEAL LOST BY LACHES.

Where a case, decided against the United States in the District Court, is not appealed according to law, the decision of the District Court is final in law.

ATTORNEY GENERAL'S OFFICE,

July 26, 1854.

SIR : In answer to your question of the 17th ult., respecting the case of Caroline J. Bell, I have to state that said Caroline, in behalf of her husband, Robert Bell, deceased, petitioner before the District Court of Louisiana, as appears by the files of the Supreme Court, and under the act of Congress of May 26th, 1824, and the acts in addition thereto, obtained a decree for a certain quantity of land in lieu of land adjudged to her by said court, and already disposed of by the United States; that an appeal from said decree was taken by the United States, but not being duly prosecuted, was dismissed by the Supreme Court, which, at the December term, 1847, issued its mandate, addressed to the District Court aforesaid, commanding such further proceedings to be had in said cause as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Now the act of Congress provides (sec. 3d) that if no appeal be taken, the decree of the District Court shall be "final and conclusive;" and in the present case, according to the ordinary rules of law and the express tenor of the mandate of the Supreme Court, the petitioner is entitled to the full benefit of the said decree of the District Court.

In a question analogous to this, Mr. Attorney General Crittenden expressed the same general opinion, but recommended

Duty of the Attorney General.

the withholding of a patent, provided the case, on which there was no appeal, or the appeal was lost by laches on the part of the United States, belonged to an identical class of cases derived under a single Spanish or French grant, and any other case, constituting a part of the same common grant, remained still pending before the Supreme Court. (Ante, vol. v, p. 475, and p. 628.)

It does not appear, according to the extract of the record filed in this case, that it comes within the rule of reservation suggested by Mr. Crittenden; and therefore it seems to me fitting that the Land Office should accept the decree of the District Court as decisive against the United States.

I am, very respectfully,

C. CUSHING.

Hon. ROBERT McCLELLAND,
Secretary of the Interior.

DUTY OF THE ATTORNEY GENERAL.

It is not the duty of the Attorney General to determine the amount of compensation payable to counsel specially retained by the Secretary of State or other Head of Department.

ATTORNEY GENERAL'S OFFICE,
July 31, 1854.

SIR: The First Auditor has referred to me the account of S. W. Inge, Esq., District Attorney of Northern California, for services rendered to Brig. Gen. Hitchcock, in consequence of a suggestion in your letter to the Auditor of the 11th of March last, that "it is the province of the Attorney General to decide upon the propriety of such charges."

On examining the papers, you will perceive that the account is for extra official services, constituting a lawful charge on either the War Department, or the State Department, whichever may have given the orders under and by virtue of which General Hitchcock engaged the services of Mr. Inge.

The only possible question of law in the case, namely, the

Sale of Government Land at Washington.

right of the District Attorney to compensation, under such circumstances, being well settled, there does not appear to be anything in the matter within the scope of my official duties, and the papers are accordingly returned for your consideration.

I am, very respectfully,

C. CUSHING.

Hon. WM. L. MARCY,
Secretary of State.

SALE OF GOVERNMENT LAND IN WASHINGTON.

Consideration of a bill for the relief of George Mattingly, presented to the President for his approval.

ATTORNEY GENERAL'S OFFICE,
August 3, 1854.

SIR: I have, in pursuance of your direction, examined the bill for the relief of George Mattingly, in order to advise as to the propriety of its being approved by you.

The legal relations of this inquiry may be gathered from the Report of the Committee of the House of Representatives on the Judiciary, which introduced the bill, and more fully from a Report made under the orders of the Secretary of the Interior by Mr. Robert Ould.

The bill authorizes the Commissioner of Public Buildings to convey to Mr. Mattingly all the right, title, interest, and estate of the United States in and to square numbered 495 in the City of Washington, for legal consideration of a certain money payment to be paid to the United States by Mr. Mattingly.

This lot is one of several conveyed by the United States, in 1793, for value, to James Greenleaf, the title of which, by reason of the conditions of the original conveyance, and the tenor of subsequent conveyances and transactions affecting the same, has become involved in great difficulties, and is the subject of an equity suit between the United States and other parties, which has been pending for a long period in the courts of the District.

Sale of Government Land in Washington.

The lot No. 495 was assessed by the city for a series of years, on the assumption of its being private property, and at length sold for taxes and purchased by Mr. Mattingly, by whom it has been occupied and improved.

On full investigation of the case, it now appears that indubitably the equitable, and in all probability the legal, title of each of these lots is in the United States, subject, in Mattingly's case, to such equities, if any, as he may have in virtue of his purchase on the tax-sale, and subsequent occupation and improvement of the premises.

The Report of the Committee on the Judiciary distinctly affirms that the legal title to the lot is in the United States, and proposes, in consideration of the equitable rights of Mattingly thus acquired in the same, to sell it to him for a price equivalent, not to the present value of the lot, but to the market value at the time of the tax-purchase by him, with interest to the present time; and the tenor of the bill corresponds with that of the Report, thus continuing to recognise the legal rights of the United States.

These considerations, it seems to me, greatly simplify the inquiry as to your official duty. It would be inconvenient to have the bill become a law, if it implied any question as to the rights of the United States in the block of land to which it appertains, and so could prejudice the interests of the Government in the pending suit. But the Government may, if it see fit, sell any one of these lots, or all of them, as well, legally speaking, before as after a final decree in its favor. The only important differences appertaining to a sale at one or the other period, would be in the price obtainable and the extent of the warranties to be entered into by the United States.

The Report and bill assume that a certain sum of money is all that Mattingly ought in justice to pay, as on a sale now by the United States; and whether this be or be not an adequate price under the circumstances, it is not a question, it seems to me, on which it needs that the President shall make a point against what is the declared judgment of the two Houses of Congress.

As to the warranties to be entered into by the United States,

Purchase of Ships of Belligerents by Neutrals.

that is a matter to be guarded by the Commissioner in making the conveyance. He should strictly confine the conveyance to the rights of the United States, whatever those may be, leaving Mr. Mattingly to encounter the outstanding interest, if there be any, under the original purchase by James Greenleaf.

Nothing else of doubt remains in the case, except whether it be proper for the United States to make sale of this lot. As to which it is enough to say that the lot was originally held by the Government only for the purpose of sale, and it does not appear to be required now as a public reservation, for any use of the United States.

I do not perceive, therefore, any sufficient reason for withholding your approbation from the bill.

At the same time, I beg leave to suggest the propriety of immediate steps being taken to bring the pending chancery suit to issue, and otherwise to vindicate the rights of the United States in the other lots in controversy, some of which may be required for the use of the Government.

I am, very respectfully,

C. CUSHING.

To the PRESIDENT.

PURCHASE OF SHIPS OF BELLIGERENTS BY NEUTRALS.

According to the law of nations, neutrals have the right to purchase during war the property of belligerents, whether ships or anything else; and any regulation of a particular state, which contravenes this doctrine, is against public law, and in mere derogation of the sovereign authority of all other independent states.

A citizen of the United States may at this time lawfully purchase a merchant ship of either of the belligerents, Turkey, Russia, Great Britain, France, or Sardinia; if purchased bona fide, such ship becomes American property and entitled as such to the protection and to the flag of the United States; and although she cannot take out a register by our law, yet that is because she is foreign built, not because she is belligerent built; and she can obtain a register by special act of Congress.

ATTORNEY GENERAL'S OFFICE,

August 7, 1854.

SIR: Your letter of the 2d instant, communicating to me that

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of Mr. Crampton, the Minister of Great Britain, calls for my opinion as to the actual state of the laws of the United States in regard to the following points:

"1st. With respect to the purchase, by citizens of the United States, of foreign ships of a belligerent power, more especially when such purchase is made in the ports of a third neutral country.

"2d. What documents a foreign ship, so purchased, must have on board, and with what formalities such ship must have complied, in order to entitle it to hoist the flag and enjoy the privileges of the country to which it has been transferred, especially before such vessel has entered the ports of such country.

"3d. What precautions are required by the law to secure the *bona fide* character of such transactions, and to prevent the neutral flag from being fraudulently used to cover ships, which are either the property of a belligerent, or are not the exclusive property of United States citizens."

For the purpose of satisfactorily replying to these questions, it will be necessary, not only to exhibit the actual state of the municipal law of this country, but also to show how far that law is founded on, and accords with, the law of nations. And the most convenient mode of doing this will be to begin with investigation of the principles of the public law as to the nationality of merchant ships in general, with more especial reference to the purchase, by neutrals, of the merchant ships of a belligerent.

Some publicists have denied that a ship must of necessity belong to any particular nation, and have assumed that it may belong to several nations or to none, (Pinheiro-Ferreira, *Manuel du Citoyen*, tom. ii. p. 603;) and that it is permissible to anybody to navigate the sea, etiam a nullo principe impetratâ licentiâ. (Grotius de Jure Belli ac Pacis, ch. 5.)

I do not affirm or even admit such doctrine. I hold it impossible, legally speaking, that the property of any man should be without nationality, unless, possibly, in the exceptional case of the uncivilized occupants of some petty islet in the Pacific or Indian sea, or some barbarous tribe of Asiatic or African savages beyond the pale of international law. Such a pretension

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is inadmissible by the law of nations, because contrary to the very nature of man, which seeks sociality of relation, and because, unless men be grouped into political societies, there can be no guaranty of law, nor assurance of positive and effective authority. Such a pretension is least of all admissible in regard to the navigation of the ocean, the extent of which, and the inherent difficulty of subjecting it to a continuous and complete *surveillance*, create a peculiar exigency for bringing all ships, and those owning or navigating them, within the scope of some nationality, with a consequent responsibility to law, both public and municipal, which are unattainable without such nationality. (Ortolan, *Diplomatie de la Mer*, tom. i, p. 178.)

The law of nations and common sense combine to require that every ship shall have a nationality, defined and evidenced in each case according to the municipal law of the particular nation to which the ship appertains.

Different states of the great republic of Christendom have established different rules, according to the policy of each, by which to determine nationality of character. The conditions of distinction concern the ship, as whether constructed or not in the country, and the owners, officers, and crews, as whether domiciled in the country or not. In selecting and combining among these ingredients of national character, governments have applied more or less of rigor, according to their respective conditions. Great Britain and the United States, and, in general, those countries, which conceive themselves to possess elements of maritime power, and are ambitious to develop those elements, have attached particular privileges of legal capability to ships constructed in the country, and owned and manned by its citizens, or domiciled inhabitants, without absolutely excluding the purchase and ownership of vessels of foreign construction. Local laws of this class, and their consequences, are fully recognised by numerous international conventions, as well as by the general public right, of all the States of Europe and America. (Ortolan, *ubi supra*, lib. ii, ch. 9.)

But there is nothing in the law of nations, which requires that a ship, in order that she may enjoy all the benefits of nationality, should have been constructed in a particular

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country, or which negatives the general right of a nation to purchase and to naturalize the ships of another nation.

On the contrary, the laws of Spain, Portugal, Austria, or other countries of continental Europe, and of most of the new states of America, have long permitted the purchase of foreign ships, and admitted them, under certain conditions, to the right, and to the correlative duties, of complete naturalization. (Hautefeuille, *Droits et Devoirs des Nations Neutres*, tom. iv, p. 30; Ortolan, *ubi supra*, tom. i, p. 184, note.) And such at the present time, but of recent introduction, is the law of Great Britain. (Act of 12 and 13 Vict. ch. 29.)

Since the public treaties, which make stipulations as to the conditions of existence and the means of proof of the nationality of merchant ships, either refer to the laws of each country on this point, or in some cases adopt and repeat them, it follows that the positive laws of this class, peculiar to each state, enter into the domain of international right, and compose integral parts thereof. (Ortolan, *ubi supra*, tom. i, p. 202.)

This doctrine covers the purchase and naturalization of ships, not less than the other subdivisions of the general subject-matter.

Thus, by the treaties between France on the one side, and the republics of New Granada and Bolivia, on the other, it is agreed to admit reciprocally, as national, all ships, wheresoever constructed, which are, in good faith, the property of the respective citizens of the contracting states.

So, also, the United States, in favor of nations deficient in maritime resources, have in several instances agreed that a ship, the *bona fide* property of, and commanded by, a citizen of the country, shall be deemed national, though her construction and her crew be foreign, as in the cases of Venezuela, Peru, Bolivia, and Ecuador.

On the other hand, in other treaties we have refused to concede nationality, so far as regards privileges of commercial reciprocity, unless to ships of home construction, as in the case of Hanover.

The general principles, thus explained, apply alike to the proof and to the fact of nationality. Each nation has the

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right to prescribe for itself convenient rules on this point. Belligerent nations have sometimes undertaken to impose their own regulations upon the neutral. (Abreu, *Tratado de Presas*, chap. 5, s. 3, no. 2.) But their pretensions in this respect are now almost universally denied; for the neutral owner is rightfully subject only to the laws of his own sovereign. (Valin, *Comment. sur l'Ordonn. de la Marine*, art. v, tit. 9, t. 3; Martens, *Des Armateurs*, ch. 2, s. 21, note *m*; Massé, *Droit Commercial*, tom. i, l. ii, ch. 2, s. 2, a. 5, no. 309; Hautefeuille, *ubi supra*, tom. iv, p. 24; Rayneval, *De la Liberté des Mers*, tom. i, p. 76.)

This question is one of evidence only. The belligerent is not to be defrauded by simulated nationality and neutrality. On the other hand, the belligerent cannot be suffered to dictate arbitrary means of proof. And there is no serious difficulty on this point, as we shall see hereafter; because the rules of evidence and of logical proof are, in substance, the same in all parts of Christendom.

It remains only to consider how far, if at all, the right, which the law of nations concedes to each country, of determining, for itself, the conditions of the nationality of merchant ships, is modified by the state of war.

It is true, that the prize regulations, occasionally issued by some belligerent nations, have undertaken to prescribe a limitation, in time of war, of the right to purchase, naturalize, and neutralize foreign ships, to the effect, that, in order to exempt from capture, in the hands of a neutral, a merchant ship purchased from the belligerent, it must be shown that she was so purchased before the existing war, or else after capture and lawful condemnation. (Hubner, *De la Saisie des Bâtiments Neutres*, tom. i, pt. 2, ch. 3, s. 10, no. 4.)

France, by the prize regulations of July 23d, 1704, art. 7, (Lebeau, *Nouveau Code des Prises*, tom. i, p. 332,) and by those of July 26th, 1778, art. 7, (Lebeau, tom. iv, p. 342,) enacted that no vessel of enemy's construction, or which had been at any time of enemy's ownership, should be reputed neutral, without proof that the sale or cession to the neutral owner, was made

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before the commencement of hostilities. (Merlin, Répertoire, *Prise Maritime*, s. iii, art. 3, p. 144.)

Russia, on the other hand, at all times just in her appreciation of neutral rights, has, in her wars with Turkey, where the question is a practical one, admitted that a ship of belligerent construction, when it has become the property, *bona fide*, of a neutral, though purchased by him after the commencement of war, is not subject to molestation. (Hautefeuille, *ubi supra*, tom. iv, p. 28, note.)

The injustice and unreasonableness of making any distinction, in this respect, between ships and any other species of property, were long since indicated, (Lampredi, *Del Commercio dei Popoli neutrali in Tempo di Guerra*, pt. i, s. 12, not. ;) and this belligerent encroachment on the sovereignty and the rights of neutrals, notwithstanding that it continues to be asserted by some states, is rejected by the most authoritative writers on the public law of Europe. (See Hautefeuille, *ubi supra*, tit. xi, ch. 2.)

The exercise of commerce by every nation is one of the incidents of its sovereignty. The sovereign rights of a particular nation are not to cease whenever any two other nations choose to go to war. The neutral state is to conduct impartially between the belligerents, but its commerce remains free, with respect to them, and to each of them ; that commerce is without limitation, saving only the restrictions as to contraband of war, and places besieged, blockaded, or invested ; and thus restricted, it extends in principle to all the possible objects of mercantile intercourse.

No government has a right to contest the validity of the sale of a ship, on the pretence of its having been, at one time, belligerent property. To undertake to do this, is to usurp a jurisdiction over the business of other nations ; it is to derogate from their independence ; it is a mere abuse of force, which a strong nation may impose on a weak one, but which every strong nation should indignantly repel, as it repels the pretension of the exclusive dominion of the sea by any one state.

The assumed right of a belligerent to annul sales of its enemy's ships to neutrals, is founded on the allegation that

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some of such sales may be simulated and fraudulent. But the fear of collusion is applicable to other property as much as to ships. And if the assumed consequences be admitted, then it follows that all goods, of the growth or produce of a country at war,—nay all other goods which have, at any time, in the progress of the war, belonged to that country,—are subject to capture and condemnation in the hands of the neutral nation; and we are thus brought to the precise state of things, which produced the last war between Great Britain and the United States.

That this is the inevitable tendency of the doctrine is made plain by inspection of the adjudications, on this point, in the admiralty courts of England, which fully recognise the soundness of the position, that no distinction, in this respect, can be made between ships and other objects of ownership and of commercial exchange.

In a very recent publication on the law of nations, the author, speaking of his own country, says: "It cannot be denied that the common law of England has hitherto been, to a certain extent, like the territory in which it prevails, of an insulated and peculiar character." (Phillimore, *International Law*, pref. p. xi.) That is true, and serves, in part, to explain the fact that no Grotius or Vattel has yet appeared in England, and that the work of highest authority on the law of nations, in the English language, was written by an American, (Wheaton.) The so called "*Treatise on the Law of Nations*" by Chitty is but a compilation of the "insulated and peculiar" belligerent code of England.

Within a few years, however, the study of the law of nations, with higher and broader views, in England, is evinced by the publication of the works of Wildman, Reddie, Polson, Manning, Phillimore, and others. Each of these works, of course, has its merits; and that of Wildman particularly so; but none of them can be received unreservedly, as authority, because none of them are exempt from the bias of local law, foreign policy, pretensions or purposes of Great Britain.

We, in the United States, of the legal profession, cannot be

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charged with any want of respect for the courts and the jurists of England ; on the contrary, their municipal law is, in the substance, our own, and we receive their decisions, on points of the common law, and of equity, and of local admiralty law, and read their books, with the same deference, as if they possessed legal authority among us. But, the moment we pass beyond the limits of mere municipal law, this relation of the jurisprudence of the two countries undergoes change. Then we perceive that our entire political history, nay, our very existence as a people, constitutes a permanent and solemn protestation against the public law of England, her prize code, and what some of her jurists are pleased to conceive and write of as the law of nations. We are constrained to observe the fact, that the doctrines of public law, received in Great Britain, especially regarding maritime rights, are not seldom in conflict with prevalent notions in all the rest of Europe. Of course, those doctrines are not entitled to conclusive authority as law, or paramount weight of consideration, with us ; nay, they require to be watched with distrust, as being, perhaps, devices of peculiar national policy, rather than received truths of universal justice and right.

I recognise with gratification, however, that, on this particular subject, the local law of Great Britain approaches to, if it does not absolutely reach, the rules of general reason. It is correctly stated by Wiseman, almost in the words of Lord Stowell, as follows :

“The title of a neutral vendee to a merchant vessel, sold by the enemy in time of war, is valid, where the property is *bona fide* and absolutely transferred, so as to divest the enemy of all future interest in it. There have been cases of merchant vessels driven into ports out of which they could not escape, and there sold, in which, after much discussion and some hesitation of opinion, the validity of the purchase has been sustained. But a belligerent is justified in enforcing such rules, as reason and common sense suggest, to guard against collusion, and to enable it to ascertain as much as possible that the enemy's title is absolutely and completely divested. * * Anything, tend-

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ing to continue the interest of the enemy, vitiates the contract altogether: to be valid, the sale must be absolute and unconditional. * * When a vessel is purchased from the enemy, by agents in the enemy's country, * * it must be shown by proper documents that the agent was legally authorized to make the purchase." (International Law, vol. iii, pp. 89, 90. See the cases of *The Sechs Geschwistern*, v C. Rob. 100; *The Minerva*, vi C. Rob. 399; *The Argo*, i C. Rob. 158.)

This text book, and the adjudications on which the text is founded, concur in opinion, that the only question to be investigated, in the case of a neutral ship, purchased from the belligerent, is the *bona fides* of the transaction. That is undoubtedly the rule. (Kluber, *Droit des Gens*, s. 234; Rayneval, *Droit de la Nature et des Gens*, l. iii, ch. 14, 15.)

But a *dictum* of Lord Camden's, that a ship cannot change her character *in transitu*, and which has been expanded by Lord Stowell into a body of doctrine, cannot be suffered to pass without challenge, because, instead of investigating the question of *bona fides* in a case of sale *in transitu*, it assumes the fact of such sale, whether of ship or goods, as conclusive evidence of *mala fides*. (*The Dankebaar Africaan*, i C. Rob. 108; *The Vrow Margaretta*, i C. Rob. 376; *The San Frederick*, v C. Rob. 129; *The Vrow Anna Catharina*, v C. Rob. 161; *The Abby*, v C. Rob. 251.) I am not aware that the doctrine has received the formal sanction of the courts of the United States. It is referred to with approbation, on two occasions, by Mr. Justice Story, (*The Ann Green*, i Gall. 274-291; *The Francis*, i Gall. 445-449;) but those allusions were dicta merely in argument, not called for by the decision in either case; and when, afterwards, one of the cases came before the Supreme Court of the United States, it appeared that there was no actual sale of the property in dispute, but only an unexecuted purpose of selling, and, of course, no question was made as to the effect of a sale *in transitu*. (*The Francis*, viii Cranch, 359.) It remains a debatable point for consideration hereafter, if it should ever be raised before the Supreme Court.

This doctrine seems to be a remnant of the old theory of

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maritime prize, which assumed that a belligerent has a vested right by the declaration of war in all sea-borne private property of the other belligerent; that no such property can be the subject of lawful sale; that all contracts of sale touching belligerent property of any sort, though valid on land, yet are invalidated by the mere fact of such property being embarked on the ocean; that, in questions of maritime prize, all presumptions are in favor of the captor and against the captured; and that the neutral, as well as the belligerent under which he claims, is to be assumed to be guilty of collusion and fraud in every commercial transaction.

This theory, in all its parts and relations, can no longer be admitted as the law of nations, still less as the law of the United States.

It cannot be repeated too frequently, that, upon the received and only true principles of public law, possession of property is presumption of ownership; that the belligerent, who claims to take property from the neutral as if belligerent property, must prove his right so to do; that if he imputes wrongful neutral possession, and *mala fides* in a contract of purchase and sale, he must prove it; that the state of war interrupts no contract of purchase and sale, or of transportation, as between neutral and belligerent, except in articles contraband of war; in a word, that neutral commerce, whether of ships or other things, except in regard to contraband of war and places blockaded or invested, is just as free in war as in peace. Certainly, if judicial conviction, positive law, and international policy have not yet reached this point, they are tending, irrepressibly, towards it, both in Europe and America.

I doubt the soundness, therefore, of the assumed rule, that the mere fact of the sale of property by a belligerent to a neutral *in transitu*, is to be taken as proof, or even as presumption, of collusion and fraud. It may be cause of suspicion, without justifying conviction.

It remains only to consider how these questions are affected by acts of Congress.

The statutes of the United States recognise the following classes of sea-going vessels, namely :

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1. Ships built in the United States, wholly owned by citizens thereof, employed in foreign commerce, which are entitled to be registered, and as such to enjoy all the rights and privileges conferred by any law on ships of the United States. (Act of December 31st, 1792, Stat. at Large, vol. i, p. 287.)

Such a ship, of course, loses her privileges as a registered ship, in being sold to a foreigner, and is thereafter treated for ever as foreign built, even though she be purchased back by the original owner or any other citizen of the United States. (See Opinion of March 16th, 1854, ante, p. 383.)

2. Vessels built in the United States, and wholly owned by citizens thereof, employed in the coasting trade or fisheries, which are entitled to be enrolled and licensed as such, and to enjoy all the privileges, in their particular employment, conferred by law on vessels of the United States. (Act of February 18th, 1793, Statutes at Large, vol. i, p. 305.)

3. Ships built in the United States, but owned wholly or in part by foreigners, which are entitled to be recorded, but not in general to be registered, or enrolled, and licensed. (Act of December 31st, 1792, *ubi supra*.)

4. Ships not built in the United States, but owned by citizens thereof: of which more in the sequel.

5. Ships built out of the United States and not owned by citizens thereof.

6. Special provisions exist, in regard to the steamboats belonging to companies engaged in the transportation of ocean mails, as well as in regard to those navigating the bays and rivers of the country; which provisions relax the registry or enrolment laws, so as to admit ownership, under certain regulations, of persons not citizens of the United States.

The registry and enrolment statutes of the United States are in imitation of those of Great Britain *in pari materia*, and for the same objects, namely, to promote the construction and ownership of ships in the country, and to facilitate the execution of local or public law. They are classified with reference to the business they may pursue; their character is authenticated; and they enjoy various advantages, from which other vessels are

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wholly excluded, or to which these are partially admitted, according to the interests and policy of the Government. (Abbott on Shipping, p. 58.)

It is with vessels of the fourth of the above classes, that we have more immediate concern.

It is observable, in the first place, that there is nothing in the statutes to *require* a vessel to be registered or enrolled. She is entitled to registry or enrolment, under certain circumstances, and, receiving it, she thereupon is admitted to certain duties and obligations. But, if owned by a citizen of the United States, she is American property, and possessed of all the general rights of any property of an American.

Secondly, the register, or enrolment, or other custom house document, such as sea-letter, is *prima facie* evidence only, as to the ownership of a ship, in some cases, but conclusive in none. The law even concedes the possibility of the register or enrolment existing in the name of one person, whilst the property is really in another. Property in a ship is a matter *in pais*, to be proved as fact by competent testimony like any other fact. (United States *v.* Pirates, *v.* Wheaton, 187, 199; United States *v.* Amedy, xi Wheaton, 409; United States *v.* Jones, iii Washington's C. C. R. 209; Taggard *v.* Loring, xvi Massachusetts R. 336; Wendover *v.* Hogeboom, vii Johnson, 308; Bass *v.* Steele, iii Washington's C. C. R. 381; Leonard *v.* Huntington, xv Johnson, 298; Ligon *v.* New Orleans Navigation Company, vii Martin's R., new series, 678; Brooks *v.* Bondsey, xvii Pickering, 441.

To the same effect is the course of adjudication in Great Britain. (See Nuestra Señora de los Dolores, i Dobson, 290; Robertson *v.* French, iv East, 130; Young *v.* Brander, viii East, 10; Frazier *v.* Marsh, xiii East, 238; McIver *v.* Humble, xvi East, 174; Frazier *v.* Hopkins, ii Taunton, 5; Sutton *v.* Buck, ii Taunton, 302; Smith *v.* Fuge, iii Campbell, 456; Recuss *v.* Myers, iii Campbell, 475; Fowler *v.* Young, iii Campbell, 240; Pirie *v.* Anderson, iv Taunton, 652; Abbott on Shipping, p. 91.)

Thirdly, in regard to the condition of a vessel owned by an American, we adopt the law as it stood in Great Britain prior

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to the relaxation of her navigation system by the act of 12 and 13 Victoria, to the effect, that the only object of registry or enrolment is to confer certain privileges under the navigation and revenue laws. A foreign built unregistered ship might, even before the above-mentioned act, have been owned by a British subject, and employed by him in any trade not interdicted to alien or other unregistered ships; but is meanwhile entitled to protection as the property of an Englishman. (*Long v. Duff*, ii Bos. & Pul. 209.)

This case, to be sure, is of a decision under the old registry acts; but it does not appear that any change, in this respect, is produced by the several registration acts codifying the old ones, passed in the successive reigns of George 3, George 4, William 4, and Victoria.* For the cases of *Palmer v. Moxon*, ii M. & S. 43, *Dixon v. Ewart*, iii Merivale, 322, and *Bergson v. Gibson*, iv Man., Gr. & Scott, 120, applied only to vessels registered as British, and claiming the privileges consequent on registry. There might, of course, be valid sale of an alien ship without registry, as also of a ship not pretending any right to registry, though British property. This conclusion follows from the case of *Benyan v. Cresswell*, in which it was well argued, that there is nothing in those acts to compel registration; that it is only the means of obtaining certain benefits, some of which are attainable without it; and that it is a matter of choice with the owner whether to obtain registry or not; which reasoning was adopted by the Court of Queen's Bench. "It was not necessary," says Lord Denman, "that there should be any registration at all." (*Benyan v. Cresswell*, xii Ad. & E. 899.)

Most of the cases above cited are, it is true, not of decisions as to national character *eo nomine*; but the doctrine established applies to both points; it having been adjudged that a register is not a document required by the law of nations, as expressive of a ship's national character. (*Le Cheminant v. Pearson*, iv Taunton, 367.)

The whole doctrine is fully and fairly stated by Greenleaf, the best authority on the law of evidence, as follows:

* This was written prior to the Act of 17 & 18 Victoria, c. 104, which is of August 10th, 1854.

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"The registry of a ship is not * * a document required by the law of nations, as expressive of the ship's national character. The registry acts are considered as institutions purely local and municipal, for purposes of public policy. The register, therefore, is not of itself evidence of property, except so far as it is confirmed by some auxiliary circumstance," &c. (Greenleaf's Evidence, vol. i, s. 494.)

It could not be otherwise decided, because numerous commercial treaties, between European or American States, make express stipulations as to proof of nationality, without requiring this to be done by register and enrolment; and, as hereinbefore explained, there is no absolute rule of the law of nations, prescribing the evidence either of ownership or of national character, although the most common proof of national character is by passport or sea letter. (Hautefeuille, Nations Neutres, tom. iii, p. 450, tom. iv, p. 23.)

Finally, the act of Parliament of 12 and 13 Victoria, ch. 29, repeals so much of 8 and 9 Victoria, or of any other act, as provides that no ship shall be registered, except such as are wholly of the build of some part of the British dominions, and makes complete provisions for the registration of foreign built vessels, the property of subjects of Great Britain. There is nothing in this act, of course, to confine the right of purchasing foreign built ships to the time of peace, or to prevent the purchase of belligerent ships, as previously authorized by law, according to the decisions of the admiralty, and other courts of the kingdom.

This act to regulate the general condition of ships in Great Britain, and the measures regarding neutral commerce adopted by the British government at the opening of the present war in Europe, contribute to show the modifications, which its laws and its policy have undergone of late years, on these points, greatly in its own interest, as well as in that of the peace and harmony of Europe.

This Government has not, as yet, followed the example of that of Great Britain, so far as to admit foreign built vessels to registry; but such vessels may be lawfully owned by Americans.

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Upon full consideration, therefore, of all the relations of the subject, there remains no doubt, in my mind, as to the right of a citizen of the United States to purchase a foreign ship of a belligerent power, and this, anywhere, at home or abroad, in a belligerent port, or a neutral port, or even upon the high seas, provided the purchase be made *bona fide*, and the property be passed absolutely and without reserve; and the ship so purchased becomes entitled to bear the flag and receive the protection of the United States.

As to the two secondary questions in Mr. Crampton's letter, namely, what documents a foreign ship, so purchased, must have on board, and what formalities she must have complied with, especially if transferred abroad, and what precautions are made requisite by law, to secure the *bona fide* character of the transaction:—Lord Stowell has well said, that “A bill of sale is the proper title to which the maritime courts of all countries would look. It is the universal instrument of the transfer of ships in the usage of all maritime countries.” (*The Sisters*, v C. Rob. 155; see *Kent's Com.* 130.)

In a word, the proof of the property of a ship is by rules of evidence, adopted generally in all courts of admiralty, adjudicating questions of international right, not materially differing in Great Britain and the United States.

At one period, it was customary for the Government of the United States to issue sea-letters and certificates of ownership to vessels owned by citizens of this country, whether the ship were or were not entitled to registry and enrolment. See the forms on this point in *Sleght v. Rhinelander*, i Johnson, 192, and ii Johnson, 531.

The further issue of those particular documents, after the 30th of June, 1810, seems to be prohibited, by the act of March 26th, 1810, so far as regards vessels not entitled to registry and enrolment. (ii Stat. at Large, 568.) But it is inexact to say, as the annotator on Abbott does, (*Abbott on Shipping*, by Story and Perkins, 63, note,) that sea-letters and certificates of ownership “have become almost, if not altogether, obsolete,” by the operation of this act. On the contrary, “sea-letters or pass-

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ports" may still be lawfully issued in the cases not forbidden by the act, and are by many of our treaties the only received evidence of the ownership and consequent nationality, of a merchant ship. *E. g.* Colombia, art. 19; Central America, art. 21; Venezuela, art. 22; Chile, art. 19; Mexico, (1831,) art. 23; Brazil, art. 21; New Granada, art. 22.

Similar engagements occur in some of the older treaties of the United States with European states, as for instance, in that of 1795 with Spain; and the articles of this treaty have been the subject of important adjudications, which conclusively show that the neutral character of a ship may be sustained, without her having on board either register, sea-letter, or passport. (The Pizarro, ii Wheaton, 227; The Amiable Isabella, vi Wheaton, 1; The Nereide, ix Cranch, 388.)

The question, of what particular documents, if any, shall be issued, from the Treasury or State Department, to a foreign built ship, lawfully owned by a citizen of the United States, in the absence of any special legislation on the subject, seems to me a proper one for the consideration of the Executive and of Congress.

I am, very respectfully,

C. CUSHING.

Hon. WM. L. MARCY,
Secretary of State.

 APPURTENANCES TO LAND.—PROVISO.

An act of Congress ceded to the city of Memphis "the grounds, and appurtenances thereunto belonging, known as the Memphis Navy Yard:"—

Held, that these words carry real estate only, and do not cover the machinery, materials, and other property of the Government in the Navy Yard.

To this enactment was appended a proviso, in these words: "Provided that the accounting officers of the Treasury" shall settle in a particular way the accounts of a Navy Agent and acting Purser:—

Held, that this proviso does not constitute a condition of the cession, but that the two enactments are distinct in legal effect, they being connected together by the word "Provided" only by negligence of legislative language.

Appurtenances to Land.—Proviso.

ATTORNEY GENERAL'S OFFICE,
August 8, 1854.

SIR: I have received your letter of the 7th inst., propounding certain questions as to the construction of the 3d section of the act of Congress making appropriations for the naval service for the current fiscal year.

That section is in the following words, namely:

"Sec. 2. And be it further enacted, That all the grounds and appurtenances thereunto belonging, known as the Memphis Navy Yard, in Shelby county, Tennessee, be and the same is hereby ceded to the mayor and aldermen of said city of Memphis, for the use and benefit of said city, and that the Secretary of the Navy order the commandant of said Navy Yard at Memphis to surrender to the mayor of Memphis said property: Provided, That the accounting officers of the Treasury, in settling the accounts of the late Navy Agent at Memphis, shall not deduct the sum of two thousand nine hundred and sixty-four dollars and fifty-nine cents, already received by him and passed to his credit on the books of the Treasury Department, from his salary as Acting Purser, provided for by an act making appropriations for the naval service of the country, for the year ending the 30th of June, 1853."

Upon which the questions are:

1st. Whether it was the intention of the law to include, in the above cession, all the buildings and machinery erected, and public property, of every description, placed at the Memphis Navy Yard, for purposes connected with the objects of the yard.

2d. Whether the cession is intended by Congress to be conditional, or whether the proviso is a distinct and independent provision, affecting only the action of the accounting officers of the Treasury in the particular subject-matter.

In considering the first question, it is only necessary to pay particular attention to the language of the enactment, and then its construction is definable according to well established rules of law.

The words are, "all the grounds and appurtenances thereunto belonging, known as the Memphis Navy Yard," are "ceded" to the city of Memphis.

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These words are descriptive of real estate and nothing else. "The grounds" are the principal, to which appurtenances may belong as incidents. Appurtenances are of the realty, but they are not and cannot be the land itself. They are incorporeal easements, or rights and privileges appendant to the inheritance.

It is plain, therefore, that the act does not cover public property, of every description, placed at the yard for purposes connected with the objects of the yard. Hemp, timber, iron, movable stores, or other chattels of any sort, are not comprehended by the words "grounds and the appurtenances thereunto belonging." Personal property, not annexed to the land, is neither "ground" nor its "appurtenances."

Indeed, as the word "appurtenances" signifies nothing but an easement or other privilege attached to the inheritance, the whole virtue of the description is in the expression "grounds known as the Navy Yard." It is equivalent to a grant of a tract of land bounded so and so, being the Navy Yard at Memphis.

Such language, *in a grant*, carries all the "buildings" on the land, as a matter of course, whether they be mentioned or not. (ii Rolle's Abr. Grant 1; Co. Lit. 4 a; Com. Dig. Grant E. 3; Luttrell's case, in Coke, 87.)

It also carries all "machinery erected" for the purpose of conducting any process of industry, art, or manufacture, provided such machinery has been annexed or attached to the freehold, so as to constitute what is in law called a fixture. (Amos & Ferrard, ch. 5.) That is to say, the only question here is, whether the machinery spoken of is in the condition of a fixture. Machinery of any sort, like other utensils or objects, not attached to the land, does not pass by the terms of the act. But fixtures are not, after grant of the freehold, removable as between grantor and grantee. Whether machinery be fixtures or not, is a mixed question of law and fact, to be determined by suitable inquiry under the direction of the Secretary of the Navy.

As to the second question, it is to be remarked that the word "Provided" following one clause of a statute and preceding

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another, does not of necessity constitute a condition or a defeasance of the preceding clause.

Even in a deed, the words following "Provided" are sometimes construed so as to make, not a condition, or limitation, but a separate and substantive covenant or agreement. (Lord Cromwell's case, ii Coke, p. 72; *Simpson v. Titterell*, Cro. Eliz. p. 242; *Dockwray's case*, Year Book, 27 H. VIII, 14; *Clapham v. Moyle*, i Lev. 155.) Everything depends on the tenor of the two clauses, and the question of their co-relation in sense.

There is an old case on the construction of statutes, in which it is said that, when a proviso, and the clause to which it is attached, are irreconcilably repugnant, the proviso shall stand and be held a repeal of the purview, because it speaks the last intention of the lawgiver. (*The Attorney General v. Chelsea Water Works*, Fitzgibbon, p. 195.) But this doctrine is now held not to be good law, (iii Kent's Com. p. 462.) A proviso in a statute, like a saving clause, is to be rejected, if it be utterly repugnant to the main enactment. (*Walsingham's case*, Plowden, p. 563; *Mitford v. Elliott*, viii Taunton, p. 13.)

The true nature and use of "Provided" are thus explained by Dwaris: "A proviso is something engrafted upon a preceding enactment, and is *legitimately* used for the purpose of taking special cases out of the general enactment, and providing specially for them. In its abuse, it contains all unconnected matters, and disposes of whatever is incapable of combination with the rest of any clause." (*Treatise on Statutes*, p. 614.)

The word "Provided" in the act under consideration, if legitimately used, would not have the effect of repealing the previous clause, or of constituting a condition precedent to the execution thereof:—it would at most amount to a saving clause or limitation, so as to take its subject-matter out of the purview of the main clause, if they were in any possible view connected in sense. If "Perrin's accounts" be a species comprehended in the genus "Navy Yard at Memphis," then it becomes requisite to inquire whether the proviso excepted anything from the previous clause, or stood in the attitude of repugnancy towards it. Such is not the case.

It is apparent on the face of the law, that the two provisions

Appurtenances to Land.—Proviso.

of the section are distinct in nature and perfectly independent one of the other, in construction. It is evident that the juxtaposition of the two provisions, and their being thrown into one sentence by the word "provided," are accidental or unintentional facts. There is nothing in the sense to create or imply dependency of enactment between the cession of the Navy Yard and the settlement of the accounts of Mr. Perrin. The word "Provided" in this instance is to be treated just as if it were a copulative conjunction merely, or a "Be it further enacted."

If Congress had really intended that this second clause should stand where it does, it would be an apt example of that class of provisoes, which Dwarris denominated an abuse, that is, a hasty method of gathering up and disposing of unconnected matters, incapable of combination with other parts of the act. But the legislative history of the matter is well ascertained. The two provisions are amendments of the bill moved and adopted separately during its passage in the Senate, having no connection of purpose, and conjecturally put together by the engrossing clerk, without the consequent doubtfulness of construction receiving the attention of Congress.

I am clearly of opinion, therefore, that the two clauses are, in legal intendment, each to be considered and disposed of separately, according to the sense of each, the one by the Secretary of the Navy, and the other by the accounting officers of the Treasury, precisely as if they were in separate sections or separate acts of Congress.

I am, very respectfully,
(Signed)

C. CUSHING.

HON. JAMES C. DOBBIN,
Secretary of the Navy.

Pre-emptions in Kansas.

PRE-EMPTIONS IN KANSAS.

By treaty between the United States and several tribes of Indians in the Territory of Kansas, the latter ceded certain lands to the United States on condition that a part of the same should be held in trust by the United States to be sold at public auction for the benefit of such Indians.

Afterwards, by act of Congress, all the lands in the Territory, to which the Indian title had been extinguished, were made subject to the laws of pre-emption.

Held, that the provision does not include the lands thus reserved by the treaties for public sale for the benefit of the Indians.

ATTORNEY GENERAL'S OFFICE,

August 12, 1854.

SIR: Your communication of the 10th instant, covering that of the Commissioner of Indian Affairs of the 8th instant, presents a question as to the legal relation between certain provisions of the act of Congress of July 22d, 1854, to establish the offices of Surveyor General of New Mexico and Kansas, to grant donations to actual settlers therein, and for other purposes, and certain treaties of May last with Delaware, Ioway, and Wea Indians.

By the treaty concluded and signed May 6th, 1854, ratified by the Senate July 11th, 1854, and proclaimed July 17th, 1854, between the United States and the Delaware Indians, they ceded to the United States the land called "The Outlet," at the price of ten thousand dollars, and other lands within certain defined boundaries, to be paid for as after mentioned.

By article 2d, the United States agreed to cause all the lands ceded, "excepting the said Outlet," to be surveyed "in the same manner that public lands are surveyed. And the President will, so soon as the whole or any portion of said lands are surveyed, proceed to offer such surveyed lands for sale at public auction in such quantities as he may deem proper, being governed in all respects, in conducting such sales, by the laws of the United States respecting the sales of public lands; and such of the lands, as may not be sold at the public sale, shall thereafter be subject to private entry in the same manner that private entries are made of the United States' lands; any or all of such lands

Pre-emptions in Kansas.

as remain unsold after being subject to private entry for three years at the minimum government price, may, by act of Congress, be graduated and reduced in price, until all the said lands are sold; regard being had, in said graduation and reduction, to the interest of the Delawares, and also to the speedy settlement of the country."

By art. 3d, the United States agree to pay to the Delaware tribe "all the moneys received from the sales of the lands provided to be surveyed in the preceding article, after deducting therefrom the cost of surveying, managing and selling the same."

"Art. 16. It is agreed by the parties hereto, that the provisions of the act of Congress, approved 3d of March, 1807, in relation to lands ceded to the United States, shall, so far as applicable, be extended to the lands herein ceded."

The act of Congress, alluded to in the 16th article, is to be found in the 2d vol. of the Stat. at Large, p. 445, chap. 46. The material provisions of that act, applicable to the lands ceded by the Delawares, are: "That if any person or persons shall, after the passing of this act, take possession of, or make a settlement on, any lands ceded or secured to the United States by any treaty made with a foreign nation, or by a cession from any State to the United States, which lands shall not have been previously sold, ceded, or leased by the United States, or the claim to which lands, by such person or persons, shall not have been previously recognised and confirmed by the United States; or if any person shall cause such lands to be thus occupied, taken possession of, or settled," &c., the President of the United States may have them removed, and may take such measures, and employ such military force, as he may judge necessary and proper for that purpose.

The treaty between the United States and the Ioway Indians, concluded and signed May 17th, 1854, ratified by the Senate July 11th, 1854, and proclaimed by the President July 17th, 1854, contains stipulations for sale of the ceded lands, and payment of the proceeds to the Ioway Indians, similar to the stipulations of the treaty with the Delawares; and also refers to the above-cited act of Congress of March 3d, 1807.

Pre-emptions in Kansas.

The treaty between the United States and the Weas and other tribes of Indians, concluded and signed May 30th, 1854, ratified by the Senate, and proclaimed in the present month of August, provides for the surveying of the lands ceded to the United States, into townships and sections; and, then, after the selection of a certain quantity reserved to the Indians, the remainder of the lands ceded are to be sold for the benefit of the Indians, and the whole proceeds, after deducting the cost of surveying, managing, and selling, to be paid to the Indians. The provision for the manner of selling is similar to that of the treaties with the Delawares and Ioways, except that the act of 1807, for expelling intruders, is not mentioned in this treaty.

The treaties, when ratified, it is to be observed, take effect from the day on which they were respectively concluded and signed.

By these treaties, the lands ceded are to be sold at public auction upon the account, and for the benefit, of the Delawares, Ioways, and Weas respectively,—they paying the cost of surveying, managing, and selling. The legal title, domain, and jurisdiction are in the United States, but the equitable beneficiary interest in the proceeds of sales is in the Indians. The proceeds of the sales to be accounted for by the United States, after deducting the cost of surveying, managing, and selling, are the consideration for the cessions of jurisdiction and sovereignty to the United States.

The treaties expressly require that the lands shall be offered at public auction before they can be subject to private entry in any form.

Question thereupon arises, upon the following provision of the act of Congress referred to, namely :

“That all the lands, to which the Indian title has been or shall be extinguished within said Territory of Nebraska and Kansas, shall be subject to the operation of the pre-emption act of the fourth September, 1841, and under the conditions, restrictions, and stipulations therein mentioned, provided, however, that, when unsurveyed lands are claimed by pre-emption, notice of the specific tract claimed shall be filed within three months after the survey has been made in the field; and on failure to

Pre-emptions in Kansas.

file such notice or pay for the tracts claimed before the day fixed for the public sale of the lands by the proclamation of the President of the United States, the parties claiming such land shall forfeit all right thereto,—provided, said notices may be filed with the Surveyor General, and acted on by him, until other arrangements shall have been made by law for that purpose.”

Now, the differences, between sales at public auction and sales to pre-emptioners, are essential and notorious; and the taking up of land by pre-emption under the provisions of the act of 1841, applied, by that of 1854, to the Territories of Nebraska and Kansas, is inconsistent with the particular stipulations for public sale in the treaties with the Delawares, Ioways, and Weas.

The Commissioner states that it is claimed, on the part of persons intending to set up pre-emptions under the act of July 22d, 1854, that this act constitutes a contract between them and the United States, and that, in so far as regards the stipulations of the treaties with the Delawares, Ioways, and Weas, of May previous, with which the act, as they assume, is in conflict, those stipulations are to be considered as abrogated by the act of Congress.

In my judgment, there is not the least shadow of foundation for this pretension, either in the general principles of law or in the proper construction of the letter of the statute.

If the act of Congress undertook, in express terms, to annul the stipulations of the treaty in question, it would be necessary to discuss the relative authority of a treaty and a statute. But there is no such extraordinary thing in the statute as an express repeal, so to speak, of those treaty stipulations. The pretence of repeal is in the assumption of implied repeal by incompatibility of provision. But, when all the treaties for extinguishing the Indian title in Kansas and Nebraska are taken into consideration, as they should be, in order to ascertain the real mind of Congress in passing this act, it will be seen that there is nothing in the act to justify the assumption of the pre-emptioners, and, of course, nothing to sustain the pretended consequences.

Pre-emptions in Kansas.

At the time of the passage of the act of Congress, the United States had lands within the Territories of Nebraska and Kansas, the Indian title to which had been extinguished, and which were then public lands for the sole benefit and use of the United States,—namely, the “Outlet,” ceded by the Delawares themselves;—the lands ceded by the Ottoes and Missourians by treaty of March 15th, 1854; by the Omahas, March 16th, 1854; by the Kickapoos, May 18th, 1854; and by the Sacs and Foxes, May 18th, 1854. In the lands so ceded by these treaties, the Indians have no interest or title, legal or equitable, nor have they any use therein, affecting the proceeds of sale. Here is ample field, in which to give effect to the pre-emption provisions of the act of Congress.

To test this view of the subject, and waiving for the present all questions as to the relative authority of a treaty and an act of Congress, let us suppose, for the argument's sake, that these various public acts, namely, the several treaties with the Delawares, the Ioways, the Weas, the Ottoes, the Missourians, the Omahas, the Kickapoos, and the Sacs and Foxes, and the act of Congress, are all acts of the same character and authority, that is to say, all treaties, or all acts of Congress. This view of the case gives to the pre-emption pretension all the premises which it can claim, and much more than it is entitled to by rules of law. Supposing this, however, it is clear that, if all those acts were acts of Congress of their respective dates, then they are to be construed together, and by no established rule would the provision for general right of pre-emption in the Territories of Nebraska and Kansas operate as a repeal of the provision for the public sale of the lands of the Delawares, Ioways, and Weas. On the contrary, in such case the general right of pre-emption would have to be construed as applying only to those lands which, by the other acts, (or treaties,) were not reserved for some other destination, of which there is an abundance to satisfy all the calls of the statute.

The right of pre-emption, accorded by the act of 1854, does not extinguish by repeal reservations belonging to the United States: no more does it extinguish any special rights reserved to the Delawares, Ioways, and Weas.

Pre-emptions in Kansas.

Beyond this, to grant pre-emptions of the lands ceded by the Delawares, Ioways, and Weas, with condition and upon trust to be sold at public auction for their account and benefit, would be a violation of the treaties, a breach of trust, a fraud upon the Indians.

Against so disposing of the choicest lands at the minimum price to settlers and pre-emptioners, the treaties with the Delawares and Ioways have expressly provided an additional guarantee, by the stipulation in relation to the act of 3d March, 1807. But, because the Weas, in their treaty, have not anticipated bad faith on the part of the United States, and expressly fenced against it by invoking to their aid the act of 1807, they are not, therefore, to be defrauded.

The stipulations in the treaties with the Delawares, Ioways, and Weas, respecting the lands ceded by them upon trust, the same to be sold at public auction, and the net proceeds thereof paid over to them, are too clear to be misunderstood. They are absolutely inconsistent with pre-emptions to settlers at the minimum price. Therefore, the pre-emptions in the Territories of Nebraska and Kansas, granted by the act of July 22d, 1854; by reference to the operation of the act of September 4th, 1841, must be restricted to lands other than those ceded by the Delawares, Ioways, and Weas upon trust to be sold by the United States on account and for the benefit of the Indians.

The "Outlet" ceded by the Delawares is subject to location by pre-emptioners, because it is excepted from the lands to be surveyed and sold for the benefit of those Indians.

By thus limiting pre-emptions to those lands in which the Indians have no title nor reserved interest, the treaties with the Delawares, Ioways, and Weas will have their due effect, and the statute for granting pre-emptions will also have its due and proper effect and force, without conflict with any of the treaties by action on the other lands ceded by the Indians.

In waiving, as unnecessary and superfluous in the present case, any discussion as to the relative authority of these treaties and an act of Congress, let me not be understood as acceding to the doctrine, that all stipulations of treaties are subject to be repealed or modified at any time by act of Congress. Without

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going into that question here, it suffices to remark that every treaty is an express compact, in the most solemn form in which the United States can make a compact. Not to observe a treaty, is to violate a deliberate and express engagement. To violate such engagements of a treaty with any foreign power, affords, of course, good cause of war. When Congress takes upon itself to disregard the provisions of any foreign treaty, it of course infringes the same, in the exercise of sovereign right, and voluntarily accepts the *casus belli*, as when, in 1798, it annulled the treaties between the United States and France.

There is distinction, undoubtedly, between a treaty with a foreign power, and a treaty with Indians who are subjects of the United States. Examples may be cited of acts of Congress, which operate so as to modify or amend treaties with Indians. As their sovereign and their guardian, we have occasionally assumed to do this, acting in their interest and our own, and not, in such cases, violating engagements with them, but seeking to give a more beneficial effect to such engagements. For though they be weak, and we strong,—they subjects and we masters,—yet they are not the less entitled to the exercise towards them of the most scrupulous good faith on the part of the United States.

It is not to be inferred, because Congress may, in some cases, have modified by legislation this or that incident of Indian relations, for their benefit, or under paramount political exigency, that, therefore, Congress intended, before the ink had become dry on these treaties with the Delawares, Ioways, and Weas, to violate those treaties, and to do this deliberately and wantonly, for the petty object of enabling a few individuals to obtain lands at the minimum price, rather than at the price of public sale, and so to inflict a wrong and a loss to that amount on the Indians.

I feel entire confidence in the belief that Congress had no such discreditable intention in the fact; and assuredly such is not the legal intendment of the act of Congress.

As for the idea suggested in behalf of these individuals, that the act of Congress raises a contract between the settler and the Government, it is a singular obliquity of vision which per-

Act increasing the Pay of the Army.

ceives a contract in that act, and fails to see any in the several treaties with the Indians. The obvious answer to the suggestion is, that no implication of legislative contract between the Government and individuals can be raised by a mere violation of law.

In fine, my opinion is that the act of Congress gives pre-emption only in such of those lands ceded, as are not required first to be offered at public sale; that the lands, ceded by the Delawares, Ioways, and Weas under condition of being first offered at public sale, are no more opened to pre-emption by the act of Congress than was the military reservation at Fort Leavenworth; that those lands cannot be taken up by settlers under claim of pre-emption; and that all claims of pre-emption there will be merely void in law, and will confer no right, now or hereafter, on which to demand the issue of a patent from the Commissioner of Public Lands.

Moreover, it will be the duty of the President to maintain by force, if need be, the plighted faith of the United States in this behalf.

I am, very respectfully,

C. CUSHING.

Hon. ROBERT McCLELLAND,
Secretary of the Interior.

ACT INCREASING THE PAY OF THE ARMY.

The provision of the Act of August 4, 1854, increasing the pay of the rank and file of the Army, takes effect immediately.

ATTORNEY GENERAL'S OFFICE,

August 19, 1854.

SIR: Your letter of the 16th instant calls for my opinion upon the question, whether the increased pay of the rank and file of the Army, provided for by the act of August 4th, 1854, takes effect immediately or at a future time?

The answer to this depends on the construction to be given to the first section of the statute, which is in the following words:

Act increasing the Pay of the Army.

“The pay of the non-commissioned officers, musicians, and privates of the Army of the United States shall be increased at the rate of four dollars per month, and to continue for the term of three years from and after the first day of January next, and until otherwise fixed by law.”

The point of construction is a nice one, it being whether the limitation “from and after the first day of January next,” applies to the verb “to continue” alone, or whether it also applies to the verb “shall be increased” in the previous member of the sentence.

Congress, if it intended that the words of futurity should have qualified the time for the commencement of increased pay, could have fixed that incontestably by placing those words in direct contact with the declaration of increase. Not having done this, they have left us to solve the doubt, which arises from the grammatical ambiguity of the terms of enactment.

I think, however, that the established rules of statute construction suffice to resolve this doubt.

The general purview of the statute, which consists of five sections of enactment, all beneficial in one way or another to the rank and file of the Army, takes effect immediately. This construction is self-evident on the remaining four sections.

Now, in order to take the first clause of the first section out of this general effect of the statute, such exceptional effect must be satisfactorily expressed. Logically speaking, the burden of the argument must be on him who affirms the exception. But we have already seen, that the words of that entire first section, and their collocation, are such as to raise a doubt only whether the time of commencing augmented pay is not made future, but are not such as to prove it satisfactorily. Therefore, no exception as to that point being established, the particular provision falls within the scope of the general purview of the statute, which has effect from the date of enactment.

This conclusion is confirmed by the consideration that the whole statute is enabling in its character, having for its purpose to keep up the efficiency of the Army, not only by encouraging enlistments, but also by discouraging desertions and otherwise promoting meritorious conduct on the part of the soldiers;

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and therefore all the provisions of the act are entitled to such a beneficial construction as will best conform to the apparent policy of Congress.

In fact, the second and third clauses of the section are self-contradictory, or rather the third clause repeals the second. For, while the second clause says that the increased pay shall continue for the term of three years from a certain date, the third says it shall continue until it be terminated by a new act of Congress. It would seem that the section is the result of the action of different minds, making successive suggestions of amendment to an original proposition, or if not so, then it was produced by subsequent thoughts of the same mind. For, as the act now stands, the increase of pay is to continue until there be new provisions of law on the subject; and such would be the legal effect of the act, if the second and third clauses were struck out, and nothing remained but the first clause of the section. We are therefore to understand the section precisely as if it contained no words whatever, except those which enact the increase of pay. The mere phraseology of the act, considered without regard to the general scope and spirit of the act, will not justify the supposition that the final thought of the legislator, after taking away from the provision its previous temporary character, and making it permanent, was to enact that the increased pay, though permanently provided, was to commence *in futuro*; for if so, he should have struck out the second and third clauses of the section as they stand, and added to the words enacting the increased pay, the words,—“*to commence on the first day of January next.*”

On this critical view of the whole matter, then, my opinion is that the increased pay of the act is to commence with the time of its enactment.

I am, very respectfully,

C. CUSHING.

Hon. JEFFERSON DAVIS,
Secretary of War.

Contract with Wilmington Railroad.

CONTRACT WITH WILMINGTON RAILROAD.

Where an act of Congress gave to a railroad company credit on certain railroad iron imported, the price to be paid in four years by set-off on a contract for the transportation of the mails:—

Held, that the Postmaster General may contract anew with the same company for additional service at additional compensation, without requiring that the new compensation be charged to the debt for railroad iron due under the first contract.

ATTORNEY GENERAL'S OFFICE,
August 19, 1854.

SIR: I have duly considered the question presented by your letter of yesterday.

By an act of Congress, approved August 30th, 1852, (Session Acts of 1851-2, p. 40,) "the Secretary of the Treasury is authorized and directed to extend the time of payment of all duties" upon "iron necessary for the construction of the Wilmington and Manchester Railroad, now or hereafter to be imported" in certain ports of the United States, and "to be used on said road for the term of four years," with proviso of proper bonds with collateral security for the payment of the amount of such duties with interest within the prescribed time. It appears that the required bonds have been executed, and that the iron, imported for the use of the company as authorized by the act, has been delivered and used on their road.

The act contains a second proviso, to the effect that "so soon as such portion of said railroad shall be completed as will render it expedient in the judgment of the Postmaster General to contract with said company for the transportation of the mail along the route of said road and upon said road, the Postmaster General do make a contract with said company to carry the mail as aforesaid, within such "rates as are charged by other railroad companies, and that all such sums as may arise in favor of said company for the carriage of the mail as aforesaid, within the said term of four years, shall be reserved by the Postmaster General for the benefit of the Treasury, and applied as they fall due towards payment and satisfaction of the bonds of the said company to be executed by them for the payment of the duties aforesaid."

The Postmaster General, so soon as portions of the railroad were completed, made the contemplated contracts for the transportation of the mail on the Wilmington and Manchester Railroad, so that now the prices to be paid by the Postmaster General for the carriage of the mail along the whole route, and by the conditions aforesaid to be credited on the bonds, will extinguish principal and interest within the four years.

Now, the Postmaster General proposes to the company to double the service, at a specified price per mile of transportation; which terms the company are willing to accept, provided one-half only of the price be applied to extinguish principal and interest on their bonds, and thereby to effect that end within the four years, and the other half to be paid in cash to the company quarter-yearly.

The proposed new contract is desirable and beneficial in itself. Whereupon the legal question is,—Whether the Postmaster General has power to contract on the modified terms proposed by the company?

I think a careful examination of the provisions of this act will suffice to relieve you of all doubt on the point.

If the language of the second proviso only be regarded, a literal reading of it might appear to forbid the new contract; for it runs that “*all* such sums as may arise in favor of said company for the carriage of the mail as aforesaid *within the said term of four years*, shall be reserved by the Postmaster General for the benefit of the Treasury.”

But the main body of the act confers on the company unequivocally a credit of four full years.

It is a current but erroneous opinion that a proviso in an act *controls* the main clause to which it is attached. It is not so. All the parts of the statute are to be considered as a whole, by whatever forms of copulative language the various clauses be conjoined, and the true legal intendment of the legislature is to be thus logically deduced from the entire act and all its provisions. Such is the process of analysis and construction to be applied, whether for the ascertainment of the general scope of an act, or the particular meaning of any part of it. To undertake to determine the signification of a particular clause of an

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act by the inspection of that clause alone, would be just as unreasonable as it would be to found in any other case a general proposition upon a partial induction of the included particulars.

In the present case, the main body of the act and its two provisoes are to be considered in association, and to be taken together as the complete expression of a definite legislative idea. That idea is,—the company to have a credit of four years from the United States for the duties, the due payment of those duties to be properly guaranteed by the company, and the price of the mail service of the company to be applied so far as it may be required to the gradual extinguishment, in the full course of the four years, of the debt due to the United States.

The Government has no more justifiable right, under this law, to require the company to complete the payment of the duties before the expiration of the four years, by compulsory set-off, than by suit on the bonds; and if the new contract proposed is consistent with the condition of the act, to have the payment of the duties made within the four years, then it may, in my opinion, be lawfully entered into by the Postmaster General.

I am, very respectfully,

C. CUSHING.

Hon. JAMES CAMPBELL,
Postmaster General.

ROCK ISLAND MILITARY RESERVATION.

The Chicago and Rock Island Railroad Company and Railroad Bridge Company cannot lawfully enter upon and use, for the purpose of a road, or for any other object, the military reservation of Rock Island, under pretence of authority from the State of Illinois.

An act of Congress giving to railroad companies a right of way through the public lands does not apply to or include the military reservation of Rock Island.

ATTORNEY GENERAL'S OFFICE,
August 21, 1854.

SIR: By your letter of the 15th instant, and the accompanying papers, it appears that the President of the United States

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has ordered the Marshal of the District of Illinois to remove trespassers upon Rock Island in the Mississippi river, and county of Rock Island, in the State of Illinois. "The Railroad Bridge Company" and "the Chicago and Rock Island Railroad Company" claim a right of way, and an acre of ground for a depot on the island, which they have surveyed, causing plats and descriptions thereof to be filed in the General Land Office. The Commissioner of the General Land Office declines to issue patents, because Rock Island was reserved from sale as public lands and appropriated for military purposes.

The whole island was reserved for military purposes, and Fort Armstrong has been built thereon. Communications have been made to the Commissioner of the General Land Office by the War Department, that the island was no longer needed for military purposes, and desiring that the officers of the General Land Office would sell it. But the Commissioner of the General Land Office did not adopt those suggestions, and deems the island not within the power and jurisdiction of his office, not lands subject to sale by his instrumentality, because reserved for military purposes.

Subsequently the Adjutant General, under the direction of the Secretary of War, in the year 1850, wrote to Col. Mason to sell this military reservation on terms most favorable to the United States; but this order was countermanded in the same year. So that Rock Island remains as a reserve for the use of the Government of the United States.

By your letter, and that of the Marshal of the United States, referred to me, two questions are presented:

I. Whether "The Railroad Bridge Company" and "The Chicago and Rock Island Railroad Company" can, by reason of their charters from the State of Illinois, shelter themselves, their agents, and servants, from being treated as trespassers and intruders in attempting to erect a railway on Rock Island?

II. Whether the selections, locations, and surveys of a way, and an acre for a depot on Rock Island, as made by "The Railroad Bridge Company" and "The Chicago and Rock Island

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Railroad Company," are authorized by the act of Congress of August 4th, 1852?

I. As to the shelter claimed under the acts of the legislature of Illinois.

The powers given by these acts are, "to condemn, according to law, property for the uses and purposes of the company." Whereupon the company allege to the marshal that they are on the island by the authority of the State, "that the State has jurisdiction over the island, never having ceded her jurisdiction to the United States."

It is to be remembered that the title to the land of Rock Island, and also the jurisdiction, were vested in the United States before and at the time when the State of Illinois was admitted into the Union. The United States have never parted with their title. And Congress is invested by the Constitution with the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

If the legislature of the State of Illinois could pass the title from the United States to a corporation, or to a citizen, by her laws, then the effect would be that the legislature of Illinois, and not the Congress of the United States, have the power of disposing of the lands of the United States, lying within that State.

The attempt to set up a law of the State of Illinois to maintain a title to land never granted away by the United States, and by the State law to take from the Government of the United States the land at Fort Dearborn, reserved for the use of the United States, was made in the case of *Wilcox v. Jackson*, lessee of McConnell, (xiii Peters, 516-517,) and the fallacy of such a thought is there exposed. "That" (say the court) "would be to make the laws of Illinois paramount to those of Congress, in relation to a subject confided by the Constitution to Congress only. And the practical result in this very case would be, by force of State legislation to take from the United States their own land against their own will, and against their laws. We hold the true principle to be this, that whenever the question in any

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court, State or Federal, is, whether a title to land, which had once been the property of the United States, has passed, that question must be resolved by the laws of the United States; but, that, whenever, according to those laws, the title shall have passed, then that property, like all other private property in the State, is subject to State legislation, so far as that legislation is consistent with the admission, the title passed and vested according to the laws of the United States."

The State of Illinois has undoubted right to dispose of its own property as it shall seem expedient: and it has the right of eminent domain,—that is, to take private property to public use, making just compensation to the owner. But this right of eminent domain does not extend to the taking of the public property of the Government of the United States.

No State can, by her laws, regulate the mode by which the land of the United States shall pass into private right and individual property, in opposition to the laws of the United States.

The corporation has not even attempted any ceremony under the law of the State to condemn to its use the land in Rock Island. Such a ceremony, indeed, would have been idle and illegal.

The ceremony used has been, in profession, under a law of the United States, which leads us to the consideration of the second question.

II. The second question involves the true construction of the act of Congress of August 4th, 1852, (Session Acts, p. 28, ch. 80,) which enacts "that the right of way shall be and is hereby granted to all rail and plank roads, or macadamized turnpikes, that are now, or that may be chartered within ten years hereafter, over or through any of the public lands of the United States over which any rail or plank road, or macadamized turnpike, are or may be authorized by an act of the legislature of the respective States in which public lands may be situated; and the said companies are hereby authorized to survey through the said public lands, to be held by them for the track of said road, one hundred feet in width * * * and when deep excavation or heavy embank-

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ment is required for the grade of such road * * * * if necessary not exceeding two hundred feet.

“Sec. 2. The said company or companies shall have a right to take from the public lands in the vicinity of said road or roads, all such materials of earth, stone, or wood, as may be necessary or convenient, from time to time, for the first construction of said road or roads, or any part thereof, through said land.

“Sec. 3. That there shall be and is hereby granted said company or companies all necessary sites for watering places, depots, and workshops along the line of said road or roads, so far as the places convenient for the same may fall upon the public lands: Provided, that no one depot or watering place shall contain over one square acre, and * * not be nearer to each other than ten miles along the line of said road or roads: * * * * Provided, further, that when a location of either of said railroads or plank roads, macadamized turnpikes, or site for depots on the line of said road shall be selected, the proper officers of such road or roads shall transmit to the Commissioner of the General Land Office a correct plat of the survey of the said road or roads, together with the survey of sites for depots, before such selection shall become operative: Provided, further, that none of the foregoing provisions of this act shall apply to, or authorize any rights in, any lands of the United States other than such as are held for private entry and sale, and such as are unsurveyed and not held for public use by erections or improvements thereon.”

It is argued for the Railroad Bridge Company, that under the act of March 3d, 1819, (Statutes at Large, vol. iii, p. 520, chap. 88,) the Rock Island reservation, including Fort Armstrong, has become subject to sale as useless for military purposes, and, therefore, liable to appropriation under the before recited statute of August 4th, 1852.

It is unnecessary to discuss here the provisions of the act of 1819, and whether they do or do not apply to Fort Armstrong and the adjacent reserved lands, so as to authorize the exercise of the special powers given in the cases therein provided for to the President and Secretary of War: because, however this

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may be, such lands would not be within the predicament of the act of 1852 as liable to be selected and appropriated to the use of the railroad company or any private person or corporation, and could only be acquired by purchase and deed in some form from the Government, and for value paid, either in view of the provisions of the act of 1819, or by special authority of Congress.

The land of Rock Island was surveyed and included in the ranges, townships, sections, and fractional sections preparatory for sales under the general system for disposing of the public lands, and was afterwards reserved from sale for the special use of the United States, and Fort Armstrong was built on that reserve. It is neither unsurveyed land nor unimproved land, but surveyed, withheld from public sale, and from sale by private entry and from sale to pre-emptioners; it was so reserved from sale and held by "erection and improvement" to the use of the United States, and so is clearly within the prohibition of the last proviso of the third section of the act of 1852. That prohibitory clause, taken all together, negatives the idea that Fort Armstrong, its barracks, parade grounds, timber, wood, stone, and other accommodations for its military use, could be encroached upon, selected, located, and appropriated to the use of the railroad company under the terms of the gratuitous grants in the act of 1852. It is palpable that the expression in the act of 1852,—“held for private entry,”—applies exclusively to lands, which are subject to superintendence and management for sale by the officers of the General Land Office, under the general system for disposing of the public lands. The adjunct words, “and sale,” apply likewise to the same description of lands. With this, the requirement that the location and “a correct plat of the survey of said road or roads, together with the survey of sites for depots, before such sections shall become operative,” shall be, by the proper officers of the road, transmitted to the Commissioner of the General Land Office, is congruous and symmetrical.

But to give notice to the Commissioner of the General Land Office, respecting the location and appropriation of land with which he has nothing to do, the jurisdiction over which belongs

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solely to the Secretary of War, to sell and "to make, execute, and deliver all needful instruments, conveying and transferring the same in fee, (as directed by the act of 3d March, 1819,) would be a want of adaptation of the parts to each other, a mal-conformation of the means to the end, the consequence of which would be mere confusion, instead of the perspicuous, harmonious, dispute-avoiding system, which the law intends for disposing of the public lands of the United States.

Lands surveyed and held for public use and the accommodation of the Government,—lands unsurveyed but held for public use,—lands surveyed or unsurveyed wherein buildings or improvements have been erected by the Government for public use,—are excepted by the last proviso of the third section of the act of 1852 from being selected, located, and appropriated in the manner prescribed by that act. Lands devoted to sale and to no other use, which, when held for sale, the officers of the Government may not refuse to sell, and which all persons have a right to purchase upon compliance with the terms prescribed by law, and those only, are subject to the provisions of the act of 1852.

Lands, not included in the general system for disposing of the public lands of the United States,—which have been, by special reservation, separated from the mass of lands for sale, and reserved for special use of the Government,—which may or may not be sold at the discretion of the President of the United States, if he has power, and if not, then by special order of Congress,—are not, in my opinion, within the description of public lands, which may be selected and appropriated by railroad, plank-road, and turnpike-road companies under the act of Congress.

This opinion accords with that given by Attorney General Crittenden under circumstances of the highest authority. For, on the 30th of July, 1852, while this act, as it passed the two Houses, was before President Fillmore for consideration, before determining whether to approve it or not, he required the advice of the Attorney General as to this very point; and, upon the opinion of Mr. Crittenden that the power of appropriation, conferred by the act, could not apply to lands held by the Uni-

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ted States for lighthouses, barracks, hospitals, arsenals, armories, navy yards, and other like purposes, and thus only, it was approved and signed by the President. (Ante, vol. v, p. 578.)

That construction is fortified by the decision of the Supreme Court of the United States, in the case already quoted of *Wilcox v. Jackson*, (xiii Peters, 513.) Beaubien claimed a pre-emption including Fort Dearborn, under the act of May 29th, 1830, for granting pre-emption to settlers, revived by act of June 11th, 1834,—and obtained a certificate of pre-emption dated May 28th, 1835, which he assigned to McConnell, who brought an ejectment against Wilcox, an officer of the Army of the United States, under a law of the State of Illinois to authorize actions of ejectment upon such inchoate rights. The pre-emptor insisted that, as the 4th section of the act of June 28th, 1834, (iv Stat. at Large, p. 687, chap. 76,) enacted “That the President shall be authorized, so soon as the survey shall have been completed, to cause to be offered for sale, in the manner prescribed by law, all the lands lying in said land districts, at the land offices in the respective districts in which the land so offered is embraced, reserving only section sixteen in each township, the tract reserved for the village of Galena, such other tracts as have been granted to individuals and the State of Illinois, and such reservations as the President shall deem necessary to retain for military posts, any law of Congress to the contrary notwithstanding;”—and as the President’s proclamation of sale did not specially except and reserve Fort Dearborn, nor the land on which it was situated, and warned settlers to prove their pre-emption before the day of sale;—that, therefore, the act amounted to a repeal of the reservation at Fort Dearborn, and a confirmation of the pre-emption. But the Commissioner of the General Land Office rejected the pre-emption which had been allowed by the Register and Receiver, and that rejection was sustained by the court.

The Supreme Court of the United States declared the pre-emption illegal, although the section including Fort Dearborn was not specially excepted in the President’s proclamation of sale. They said the act authorizing the President to proclaim

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and sell the lands, "has relation to a sale of lands in the manner prescribed by general law at public auction, whilst the claim to the land in question is founded on a right of pre-emption, and governed by different laws." * * * "But we go further, and say that, whensoever a tract of land shall have been once legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands; and that no subsequent law, or proclamation or sale would be construed to embrace it, or to operate upon it, although no reservation were expressly made of it."

When, in the fourth section of this act of August 4th, 1852, a right of way is granted to the Lockport and Buffalo Railroad Company, "through the public lands of the United States lying in Black Rock, in the county of Erie and State of New York,"—those lands being held for public use, with buildings and improvements erected thereon,—the grant is specially guarded by requiring "that, in the opinion of the President of the United States, such grant be not injurious to the public interest, and that the location shall be approved by the President as to the position and width of the said railroad."

Reservations for public use, built upon and improved, cannot be selected, surveyed, and appropriated under the first, second, and third sections of the act of 1852: the proviso in the third section forbids it. Corporations are not permitted to locate a way through such reservations and make improvements on any part of them, nor to encroach upon the reservations for public purposes, and take earth, stone and timber, according to their private convenience and interests, and to the detriment of the public interests.

It is argued for the corporation that, as Fort Armstrong had been decided to be useless for military purposes, and as an order of sale had issued to Colonel Mason, that therefore it is now held for sale, within the purview of the act of 1852.

But Colonel Mason did not sell: that was but an order executory, not a matter executed. There was *locus pœnitentia*, and the order of sale was countermanded. The expression of opinion that the site was useless for military purposes, and the re-

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quest that the Commissioner of the General Land Office should take the Rock Island reservation under his jurisdiction, did not reunite it to the general mass of public lands held for sale by the General Land Office. The Commissioner of the General Land Office very properly declined to take jurisdiction over it, either for private entry and sale, or for any other mode of sale known in that Department.

The *order* to sell, not executed, did not divest the President and Secretary of War of their power and jurisdiction over it, if they had any. That order was itself revoked. How, and when, is this reservation of Rock Island for sale? Not until the President and Secretary of War, if they have the power, shall order it for sale; and then such order may be countermanded at the discretion of the President. Such authority, jurisdiction and duties as the President and Secretary of War may have in regard to the military reservation of Rock Island, cannot be divested but by an actual sale and conveyance by the Secretary of War or by special act of Congress.

The selections and surveys of the tract for a railroad, and of an acre for a depot on the military reserve of Rock Island as made, are, in my opinion, unauthorized and void; and therefore do not secure and protect the members of the corporation, their officers, agents, and servants, nor prevent their expulsion as intruders and trespassers in conformity with the existing orders of the Department.

I am, very respectfully,

C. CUSHING.

Hon. JEFFERSON DAVIS,
Secretary of War.

RESOLUTIONS OF CONGRESS.

Joint resolutions of Congress are not distinguishable from bills, and, if approved by the President, or if duly passed without the approval of the President, they have all the effect of law.

But separate resolutions of either House of Congress, except in matters appertaining to their own parliamentary rights, have no legal effect to constrain the action of the President or of the Heads of Department.

ATTORNEY GENERAL'S OFFICE,

August 23, 1854.

SIR: I have considered the question presented by your letter of the 15th instant, as to the legal effect of certain votes of the Senate and of the House of Representatives, in the case of Isaac Bowman.

The act of Congress of July 5th, 1832, after requiring, in the 1st and 2d sections, that the United States do refund to the State of Virginia the amount of certain payments made by her to the officers of the Virginia line in the war of the Revolution, on account of half-pay, and that the United States do also pay to the State of Virginia the amount of certain judgments recovered against that State on account of pay of officers in her service during the same war, proceeds, in the 3d section, to enact as follows, viz. :

“That the Secretary of the Treasury be, and he is hereby directed and required to adjust and settle those claims for half-pay of the officers of the aforesaid regiments and corps, which have not been paid or prosecuted to judgment against the State of Virginia, and for which said State would be bound on the principles of the half-pay cases already decided in the Supreme Court of Appeals of said State; which several sums of money herein directed to be settled or paid shall be paid out of any money in the Treasury not otherwise appropriated by law.” (iii Stat. at Large, p. 564.)

The duty of executing this law, imposed at the outset on the Secretary of the Treasury, was transferred, first to the Secretary of War, by the act of March 3d, 1845, (iv Stat. at Large, p. 779,) and afterwards to the Secretary of the Interior by the

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act of March 3d, 1849, creating the Home Department, (ix Stat. at Large, p. 395.)

The claim of Isaac Bowman, deceased, through his legal representatives, to half-pay under this law, was presented to the Commissioner of Pensions, and by him rejected. It came afterwards before the Secretary of the Interior, and he, for reasons assigned, affirmed the decision of the Commissioner. (MS. October 3d, 1853.)

Thereupon, Bowman applied to Congress for relief, and it would seem, by petition simultaneously to both Houses; for, on the 20th of February, 1854, the Senate passed the following resolution, namely:

“Resolved, That the claim of Isaac Bowman, legal representative of Isaac Bowman, deceased, for half-pay due his father, under the act of the General Assembly of Virginia, of May, seventeen hundred and seventy-nine, be referred to the Secretary of the Interior, for liquidation, under the act of Congress of July fifth, eighteen hundred and thirty-two, and that the Committee on Pensions be discharged from the further consideration of the case.”

And on the 1st of July, 1854, the House adopted a resolution, reported by the Committee on Revolutionary Claims, in the following words, namely:

“Resolved, That the petition in the case of Isaac Bowman be referred to the Secretary of the Interior for liquidation, under the act of July 5, 1832, and that this committee be discharged from its further consideration.”

Whereupon the question of law submitted to me for consideration is, whether, on the supposition that the Secretary, on a re-examination of the case, maintains his original opinion, and believes the claim not to be allowable under the provisions of the said act on the evidence presented, is he bound to consider these two resolutions, or either of them, as mandatory on him, and as compelling him to liquidate the claim against his judgment of the right of the case?

It is impossible for me to conceive of any other than a negative answer to this question.

When an act of Congress commands a Head of Department

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to do a particular thing, and the thing to be done is ministerial in its nature, as, to pay so much money to A. B., then the Head of Department is bound in law to do the thing, and may be compelled by mandamus of the Circuit Court. (*Kendal v. United States*, xii Peters, 610.)

The same doctrine applies to a joint resolution, properly enacted, which differs from an act of Congress only in form.

But, if the tenor of the law be not mandatory of a mere ministerial act to be done, then the Head of Department acts according to his discretion, in subordination always to his constitutional and legal relation to the President of the United States. (*Decatur v. Paulding*, xiv Peters, 497.)

The reason of this must be apparent to the least reflection.

The act of a Head of Department is, in effect, an act of the President. Now, the Constitution provides for co-ordinate powers acting in different and respective spheres of co-operation. The executive power is vested in the President, whilst all legislative powers are vested in Congress. It is for Congress to pass laws; but it cannot pass any law, which, in effect, coerces the discretion of the President, except with his approbation, unless by concurrent vote of two-thirds of both Houses, upon his previous refusal to sign a bill. And the Constitution expressly provides that orders and resolutions, and other votes of the two Houses, in order to have the effect of law, shall, in like manner, be presented to the President for his approval, and if not approved by him shall become law only by subsequent concurrence in vote of two-thirds of the Senate and House of Representatives.

If, then, the President approves a law, which imperatively commands a thing to be done, ministerially, by a Head of Department, his approbation of the law, or its repassage after a veto, gives constitutionality to what would otherwise be the usurpation of executive power on the part of Congress.

In a word, the authority of each Head of Department is a parcel of the executive power of the President. To coerce the Head of Department is to coerce the President. This can be accomplished in no other way than by a law, constitutional

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in its nature, enacted in accordance with the forms of the Constitution.

Of course, no separate resolution of either House can coerce a Head of Department, unless in some particular in which a law, duly enacted, has subjected him to the direct action of each; and in such case it is to be intended, that, by approving the law, the President has consented to the exercise of such coerciveness on the part of either House.

For instance, the act of September 2d, 1789, (1 Stat. at Large, p. 66,) renders it the duty of the Secretary of the Treasury to "make report and give information to either branch of the legislature, in person or writing, as he may be required, respecting all matters referred to him by the Senate or House of Representatives, or (and) which shall appertain to his office." And, in practice, the same duty is imposed on other Heads of Department. But, except where otherwise provided by law, every such communication of a Head of Department to either House must be understood to be made with the assent, express or implied, of the President. Suppose, for example, the House of Representatives should, by vote, assume to require the Secretary of State to communicate to it a copy of a draft of a treaty under negotiation, or his instructions to some diplomatic agent of the Government:—still, it is clear, he could not do this except with permission of the President.

On the same principle, and with stronger reason, it is not in the power of a separate resolution of either House to command or to control the executive action of a Head of Department, that is, of the President, in the construction and execution of a general law of the land.

It does not help the case, constitutionally speaking, if there should happen to be a resolution of the same substance, or even of the same identical words, passed by each House; for such separate resolutions have not the form nor the responsibilities of enactment, according to the rules of the two Houses, nor do they possess the conditions of a law according to the Constitution.

Therefore, even if the two resolutions in Bowman's case were mandatory in their terms, which they are not, yet they have

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not the constitutional requisites of any authority, either mandatory or directory, over the action of the Secretary.

Indeed, it seems little better than a mere truism to say, that a separate resolution of either House of Congress is not a law.

Whenever a general act is passed, like that for the payment of half-pay to certain officers of the Virginia line, that is to say, a law embracing a defined class of cases, and assigning to a Head of Department the executive duty of ascertaining the particular cases of the class, and applying the law to them, in such case the terms of the law constitute a rule for his government. It is incumbent on him, as on every other citizen, to obey the law. To obey it, in him, is to execute it according to its provisions, as conscientiously construed by him in his best judgment, or if he doubt, then as he may be advised by the Attorney General. To do otherwise, that is, on the one hand to refuse to apply the law to cases to which it is justly applicable, or on the other to apply it to cases to which it is not justly applicable, is to disobey, not to obey,—to violate, not to execute,—the constitutional will of the legislative department of the Government.

It may happen that a claim shall arise, which, according to the plain terms of the law, is not within its provisions, or which is not proved by the evidence which the law prescribes, and so is rejected by the Secretary. In such a case the claimant can apply to Congress, and that body may pass a private law for the relief of the party, dispensing with its own conditions of applicability, or its prescribed rules of evidence. But no such dispensing power resides in the Secretary.

Or the Secretary, in the exercise of his lawful discretion in construing such a general act of Congress, may adopt a construction of it, which is deemed erroneous by the two Houses of Congress. In that case, they will pass a declaratory act, which, being approved by the President, or repassed after his refusal to approve it, constitutes a new law for the government of the Secretary.

But the Constitution has not given to either branch of the legislature the power, by separate resolution of its own, to construe, judicially, a general law, or to apply it executively to a given case. And its resolutions have obligatory force only so

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far as regards itself or things dependent on its own separate constitutional power.

Any other view of the subject would result in the absurd conclusion that a separate resolution of either House could repeal or modify an act of Congress. For, as the Supreme Court well say, in one of the cases before cited, a Head of Department "must exercise his judgment in *expounding* the acts and resolutions of Congress, under which he is, from time to time, required to act." That exposition of the law, conscientiously made by him, and with the aid of the law officer of the Government, is the law of the case. If the question be one of judicial resort, the exposition of the statute by the Supreme Court will constitute the law. But, if it be a mere executive question, then the exposition of the particular Secretary, or of the Attorney General, is just as much the law, and, as such, binding on the conscience of the Head of Department, as any other part of the statute, which may happen to be of unquestionable import, and so not to require exposition. In fine, it becomes the law; that is, the authorized construction of the legal intendment of the act of Congress. That ascertained legal intendment of a statute cannot be authoritatively changed by a separate resolution of either or of both Houses; but only by a new act of Congress.

The conclusive test of the whole doctrine is, to inquire whether the Supreme Court of the United States would adjudge that the report of a committee, or a resolution of either House, has the effect of repealing, modifying, or conclusively construing an act of Congress. It is perfectly clear that they would not. (*Albridge v. Williams*, iii Howard, 9.)

It does not appear, in the case of Bowman, why the obvious and usual course of proposing a law for his relief was not followed, provided the two Houses of Congress would, on full consideration of his claim, in the established legislative forms, have sanctioned the view of it, which is implied by the passage of these resolutions in connection with the reports of the Committees on Revolutionary Claims and on Pensions in the case.

The present course may have been pursued, after ascertaining that Congress would not pass a declaratory law mandatory on the Department.

Or, the method actually adopted, of a mere reference to the Secretary, without any language of command, or even direction, may have been adopted in the supposition that an opinion of the Attorney General, of March 27th, 1849, in the case of Churchill Gibbs, constitutes a general rule of law governing the Departments.

That opinion is in the following words:

"In the case of the representatives of Churchill Gibbs, referred to this office, I am of opinion that, both Houses of Congress having, on the 12th of January, 1848, resolved that the claim was provided for by the act of July 5th, 1832, and the House of Representatives having done so again at the last session, after the executive department had more than once maintained a different doctrine, I am of opinion that a proper deference to the legislature demands that their construction should be adopted. That a claim should be rejected by the Executive because Congress had not, in its opinion, provided for it, and the claimant be referred to the latter for relief, and, going there, be referred back to the Executive by Congress, because, in their opinion, they had provided for it by the existing laws, and, that it should still be disallowed, would, in my opinion, be a reproach upon the justice of the Government, which it is not only in the power, but the duty, of the Executive to prevent. Without deciding, therefore, upon the first of the two questions submitted, I am very clear that, upon the ground included within the second question, the claim should be liquidated." (Ante, vol. v, p. 82.)

It is not readily perceivable why the Executive should act against his conscience to prevent the reproach of "a disagreement between the Executive and the two Houses of Congress," when the thing done by the former is a complete legal act within his constitutional competency, and the thing done by the latter is a mere expression of opinion, not possessed of any obligatory force by the Constitution. The obvious way of determining any such disagreement, and removing "the reproach upon the justice of the Government," is for Congress to pass a declaratory law in the forms of the Constitution.

And, as a question of duty, how can it be incumbent on the

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Executive, out of deference to the opinions of a committee of either House, to depart from a constitutional and authoritative exposition of the law,—that is, to allow a private claim, pronounced by the proper Heads of Department and the Attorney General to be unlawful,—that is, to violate the law? For, as we have seen, a report of a committee, or a separate resolution of either House, is not itself the law, nor an authoritative exposition of the law. The opinion of either House, or of its committees, should be regarded with all possible deference in matters of pure discretion, but cannot justify the violation of an act of Congress.

But considerations, independent of the arguments employed, affect the authority of the opinion in the case of Gibbs.

In the first place, it is remarkable that this opinion is founded on complete misapprehension of the facts. The basis of it is laid in the following statement :

“Both Houses of Congress having, on the 12th of January, 1848, resolved, that the claim was provided for by the act of July 5th, 1832, and the House of Representatives having done so again at the last session.”

Such a proceeding on the part of Congress as is here set forth, would be so anomalous, that, in reflecting on the statement, it seemed to me to require verification. I proceeded accordingly to investigate the legislative history of the case, and do not find that there is any resolution of the Senate of the 12th of January, 1848, on the subject of Churchill Gibbs, nor any resolution of either House, at any time, which declares that the claim is provided for by the act for liquidating the half-pay claims on the State of Virginia. Neither House undertook, by separate resolution, to pass a declaratory *quasi* law, obligatory on the conscience of a Head of a Department.

What actually transpired in Congress will appear by the following extracts from the journals of the Senate and of the House of Representatives :

“In the Senate of the United States, Tuesday, December 21st, 1847—

“Mr. Mason presented the petition of Thomas N. Welch, administrator of Churchill Gibbs, deceased, an officer in the

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revolutionary army, praying to be allowed commutation pay; which was referred to the Committee on Revolutionary Claims."

"In the Senate of the United States, January 5th, 1848—

"Mr. Rusk, from the Committee on Revolutionary Claims, to whom was referred the petition of Thomas N. Welch, submitted a report accompanied by the following resolution:

"Resolved, That the Secretary of the Senate do send the petition, and other papers accompanying it, to the Secretary of War, with this report."

"In the House of Representatives, December 30th, 1847—

"Mr. Goggin presented the petition of Thomas N. Welch, administrator of Churchill Gibbs, deceased, late a soldier of the Revolution, praying for a residue of half-pay due his intestate; which was referred to the Committee on Revolutionary Claims."

Here the character of the petition changes. In the Senate it was for commutation pay; in the House for a residue of half-pay.

This equivocation is the consequence of the alternative nature of the case, it being at one time urged as a claim for *commutation* from the United States *in addition* to commutation from Virginia, and at another as a claim on Virginia for arrears of *half-pay* in addition to commutation.

"In the House of Representatives, January 12th, 1848—

"Mr. Daniel P. King, from the Committee on Revolutionary Claims, made a report upon the petition of the administrator of Churchill Gibbs, accompanied by the following resolution, which was read and agreed to, viz.:

"Resolved, That the petition and accompanying papers be transmitted to the Secretary of War with this report."

"In the House of Representatives, February 28th, 1849—

"Mr. Lynde, from the Committee on Revolutionary Claims, to whom was referred the petition of Churchill Gibbs, administrator, made a report thereon in writing, which concluded with the following resolution, which was read and agreed to by the House:

"Resolved, That the committee be discharged from the fur-

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ther consideration of this case, and that the petitioner have leave to withdraw his papers.

“Ordered, That said report be laid on the table and printed.”

Thus it is manifest that neither the Senate, by its vote of January 5th, 1848, nor the House, by its vote of January 12th, 1848, intended in the least degree to interfere with the constitutional right of judgment of the Secretary charged with the construction and execution of the law; but, on the contrary, carefully abstained even from expressing any opinion as to the merits of the claim. Each House was content that the views of its committee, whatever they might be, should go to the Secretary with the papers; and there the action of both Houses undeniably stopped.

Furthermore, the vote of the House of Representatives of February 28th, 1849, instead of being an expression of the opinion of that body in favor of the claim of Gibbs, was just the contrary of this. It was in substance the definite rejection of the petition. It was a positive refusal to back it by affirmative opinion. It was conclusive acquiescence in the rightfulness of any previous decision of the departments. It is immaterial what the *report* at this time contained, for it was not accepted by the House; it was laid on the table. If, however, it be argued that the tenor of the report was favorable to the claim, then the vote to lay on the table is the formal rejection of all the opinions of the report, by decisive action of the House. If, then, it could be admitted as sound law that a resolution of either House constitutes an obligatory rule of action, that premise should have brought Mr. Johnson to the rejection of the claim, not its allowance; for instead of differing in opinion, Congress had come to be in accordance with the Executive. Unfortunately, he was led to misapprehend entirely the tenor of the resolution of the House.

But there is another incident of the case, which requires now to be considered.

The letter of Mr. Ewing to the Attorney General is dated March 19th, 1849, and is in the following words:

“The claim of Churchill Gibbs, an applicant for half-pay under the provisions of the act of July 5th, 1832, was once con-
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sidered and reported upon adversely by your predecessor. Since that time, it has been before Congress, and committees of both Houses have, as I am informed, reported in its favor.

"This, in my judgment, affords a sufficient reason for the reconsideration of the case by the law officer of the Government, though not a substantial ground for the admission of the claim.

"For these reasons, I respectfully refer the case to you, and ask of you its consideration."

In the letter, be it observed, Mr. Ewing does not say that the two Houses have *passed resolutions* in favor of the claim of Churchill Gibbs; but only that, since it was considered by Mr. Johnson's "predecessor," (Mr. Clifford,) committees of both Houses had, *as he was informed*, reported in its favor. Now, there is obvious difference between the report of a committee, which is the opinion of a majority of the members of the committee only, and a resolution of either House, which is the opinion of a majority of the members of that House. Mr. Ewing's premises were substantially erroneous, because, as we have seen, the final action of Congress had been adverse to the claim; there being no recent report in the Senate, and the latest proceeding of Congress having been the adverse resolution of the House. It is not probable that Mr. Ewing would have consented to reopen the case, if he had possessed exact knowledge of what had occurred in Congress. But, from his erroneous premises, such as they were, he proceeds to draw what was the only legitimate inference from the supposed facts, as follows:

"This, in my judgment, affords a sufficient reason for the reconsideration of the case by the law officer of the Government, though not a substantial ground for the admission of the claim."

And, for the reasons thus stated, he then refers the case to the Attorney General, and asks for *its* consideration. What he desired, and the only thing he submitted, was to have *the case itself* reconsidered upon its merits, in the light of the arguments of the (supposed) reports of the committees of both Houses.

Without re-examining the merits of the question, and pro-

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ceeding to assume erroneously that two questions had been put to him, namely:—1. Is the claim payable under the 3d section of the act of 5th July, 1832? 2. What weight shall be given to the report of a committee of either House, agreed to by that body?—the Attorney General proceeded to answer the second,—which was not in the reference, and which Mr. Ewing had already decided for himself and decided rightfully, as sufficient cause of re-examination only,—and did not answer the first, which was the only question contained in Mr. Ewing's reference,—and so concluded that the supposed action of the two Houses was, in its legal effect, obligatory on the Executive.

Reluctant as I am, at all times, to differ in opinion with any of my predecessors, I feel constrained in this case to withhold assent from legal conclusions, which, as it seems to me, involve the gravest mischief, and are not less erroneous than the premises of supposed facts, on which the conclusions are founded.

Most assuredly it cannot be sound constitutional doctrine, that a declaratory resolution of either House, construing a general law, is obligatory against the judgment of the Executive, and that it is the duty of the Executive to yield its judgment in all such cases to the mere opinion of the Senate or of the House of Representatives. Such an assumption is contrary, as I have shown, to the plain letter and clear spirit of the Constitution.

If it be said that, although a Head of Department be not absolutely bound in law to yield up his own judgment, yet that, in the language of the opinion under consideration, it is his duty so to do, out of deference to both or either of the Houses, or to prevent the public reproach of disagreement between the legislative and executive branches of the Government, or for any other possible consideration of mere expediency, I reply that the whole weight of the argument of expediency is the other way; for the adoption of such a rule would inevitably tend to the disorganization of the Government.

In the first place, the President is not bound to yield up his own judgment, even to the most unequivocally expressed opinion of the two Houses, in the form of a bill passed through all the

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solemnities of constitutional enactment. But, if the hypothesis under consideration be maintainable, a separate resolution of either House will constrain the Executive, when a bill, solemnly passed to be enacted, would not. Of course this idea would afford easy means of striking the veto power and the rights of minorities out of the Constitution, and conferring on a bare majority of the two Houses that legislative omnipotence, which it was one of the great objects of the Constitution to guard against and avoid.

According to the letter of the Constitution, resolutions of the two Houses, even a joint resolution, when submitted to the President and disapproved by him, do not acquire the force of law until passed anew by a concurrent vote of two-thirds of each House. On the present hypothesis, the better way would be not to present the resolution to the President at all, and then to call on him to accept it as law, with closed eyes, and, however against law he may know it to be, yet to execute it out of deference to the assumed opinion of Congress.

In the second place, the hypothesis puts an end to all the forms of legislative scrutiny on the part of Congress. A declaratory law, especially if it involve the expenditure of the public treasure, has forms of legislation to go through to insure due consideration. All these time-honored means of securing right legislation will pass into desuetude, if the simple acceptance of a resolution, reported by a committee, is to be received as a constitutional enactment, obligatory on all concerned, including the Executive.

In this way, instead of the revenues of the Government being subject only to the disposition of Congress in the form of a law constitutionally enacted, they will be transferred to the control of an accidental majority, expressing its will by a resolution, passed, it may be, out of time, and under circumstances, in which a law, duly and truly representing the will of Congress, could not have passed. And thus, all those checks and guards against the inconsiderate appropriation of the public treasure, so carefully devised by the founders of the Government, will be struck out of the Constitution.

Where is the doctrine to stop? Will a declaratory resolution

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of one House constitute a law, or must both Houses concur? Will one resolution suffice? Or must there be several successive ones, cumulative one upon the other? And what is to be done if opposing resolutions be passed by the two Houses?

And by what intelligible ground of constitutional distinction is the Executive to obey, out of deference, and against his judgment, a separate resolution of either House on the subject of private claims, and not on any other business of the Government? All general laws are a rule comprehending particulars more or less numerous. The construction of a law is, in part, the consideration of what particulars are included within the rule; and the execution of the law is the application of that rule to the particulars of ascertained inclusion. If, by separate resolution of either House, a pension law or half-pay law may be construed with conclusive legal effect, so may any other law within the whole scope of the legislation of the United States.

Nay, instead of assuming it as a general rule of duty that the Executive is to obey, as of course, out of deference, and against his better judgment, a separate declaratory resolution of either House, we should assume the contrary as a rule; because such a resolution is, on its face, an attempt to coerce the conscience of the Executive by extra-constitutional means; and because, if the resolution were expressive of the true will of Congress, it may be presumed that it would have been passed into a law according to the Constitution. I cannot readily conceive of any innovation so dangerous to good legislation, and so well calculated to defeat the will of Congress itself, as the setting up of a hasty vote or order of either House accepting the report of a committee, and adopted out of time perhaps, to have the force of law. Wherefore, it is most respectfully urged that, in the interest of the legislative department of the Government, not less than that of the Executive, the doctrine supposed is wholly inadmissible, even regarded in the light of expediency.

But, after all, is not our first duty that of humble submission to the Constitution? Of what avail are arguments of expediency against the positive injunctions of the Constitution? How can the consideration of "deference" to any human power, or of possible liability to "reproach," justify, in a Head of Depart-

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ment, the deliberate infringement of the Constitution? There is but one safe guide for any of us, and that is the Constitution, and the laws under it duly enacted by Congress.

A mere vote of either or of both Houses of Congress, declaring its opinion of the proper construction of a general law, has, be it repeated, in itself, no constitutional force or obligation as law. It is opinion merely, and to be dealt with as such, receiving more or less of deference, like other mere opinions, according to the circumstances. And Mr. Ewing was right in so construing the action of Congress in the case of Churchill Gibbs.

What might have been the fate of that claim, if it had been reconsidered on its own legal merits, it is impossible now to know of absolute knowledge, nor is it relevant to the present purpose to inquire. Of course, there is no occasion for me to express or to make up any opinion of my own regarding its merits. It is referred to here only so far as its history is involved in the legal question under consideration. The pertinent fact is that, at the time when the claim was presented to Mr. Ewing, it had been rejected by Mr. McLane, Secretary of the Treasury, Mr. Marcy, Secretary of War, and Mr. Clifford, Attorney General. See Mr. Clifford's opinion of June 2d, 1847, (*Ante*, vol. iv, p. 590.) See also Mr. Taney's opinion of March 21st, 1833, (*Ante*, vol. ii, p. 555.) All these Heads of Department may have erred in their conclusions, or they may not. However this may be, we have Mr. Ewing's own declaration of his reason for reopening the case, and of the whole extent to which that reason carried his mind. We have a right to assume that he would not have reopened it, but for his not possessing exact knowledge of the final action of Congress in the premises. The law requires a good and sufficient cause to justify one Head of Department in reopening a claim, disposed of by his predecessor. (See *U. S. Bank v. Bank of Metropolis*, xv Peters, 377, 401.) Mr. Ewing supposed such cause to exist in the case, and that therefore all inquiry was not foreclosed as against the claimants, and, *a fortiori*, that it was not foreclosed against the Government. Accordingly, he referred the claim to the Attorney General for the precise and

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sole purpose of having it examined on its legal merits, in deference to the supposed recommendation of Congress. Then, the Attorney General's attention not being fastened upon the only point referred to him, namely, the merits of the case, and with an erroneous impression upon his mind of the action of Congress, he took the impression that the supposed resolutions of Congress were of such legal force and exigency as to preclude all further inquiry on the subject, *pro* or *contra*, and to conclude the conscience of the Government.

Thus it happened that the Gibbs claim, notwithstanding all its adverse antecedents, got to be allowed and paid without final examination of its merits, by extraordinary good luck; the good luck of its being assumed in two Departments, that of the Interior and the Attorney General, that a resolution of one or the other House of Congress existed in a certain sense, whilst it did not exist at all, or existed in the opposite sense, and then acting upon such erroneously assumed resolutions as repealing an act of Congress.

In the infinite variety and complexity of the business of the Government, errors like this must of course occur, from time to time, in the Departments. But the error, committed in this instance, has a special application here. For it is not possible to imagine a stronger illustration of the dangers and inconveniences of looking beyond the statute-book for the law, and seeking it in the labyrinth of the journals, reports, and other documents of Congress.

I do not scruple to express the most unhesitating and confident belief, that if Mr. Attorney General Johnson were now to revise the case of Churchill Gibbs, in the light of the records, which are before me, he would come to the same conclusion that I do, and would clearly perceive that, instead of being a precedent and a rule of law to guide us, that case was a mere accident or mistake, a solitary fact of warning and admonition, addressing itself alike to Congress and to the executive officers of the Government.

Upon the views of the case of Churchill Gibbs, the necessary conclusion is, that the opinion of the Attorney General, therein, cannot aid the claim of Bowman.

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Thus far, Bowman's case has been discussed by me, as if there existed resolutions of either House assuming to coerce regarding it, and to control, the judgment of the Secretary. But it is not so. The resolutions in Bowman's case are simply resolutions of reference to the Secretary. To consider them as concluding his conscience would not only be to make such resolutions equal to a law, but even superior to it; for if either of the resolutions before me had been solemnly enacted into an act of Congress, it would not be mandatory on him in its legal effect. Neither House undertook to pass declaratory resolutions, mandatory on him; and it is presumable that, if asked to do so, they would have refused. If asked to pass a resolution declaratory of the construction of the general law and mandatory in its legal effects, and if disposed to do so, we may assume that they would have proceeded in the forms of the Constitution, by a joint resolution to be submitted to the President. This they have not done. What they did, was merely to commend to the Secretary the consideration of the favorable opinions of their committees. It is the precise contingency, succinctly, but truly, described by Mr. Ewing, in the case of Gibbs, where he says, in regard to mere opinions of committees, adverse to a previous decision of the competent officers of the Government: "This, in my judgment, affords a sufficient reason for the reconsideration of the case by the (proper) officer of the Government, *though not a substantial ground for the admission of the claim.*" I accept unequivocally, as the sound law of the question, this declaration of Mr. Ewing.

I think, then, that the opinions expressed in Bowman's case by the committees of the two Houses, and the consequent action of those bodies therein, require of you to reconsider carefully, and in the spirit of the most respectful deference to those opinions, the claim of Bowman, in all its parts and relations; but, that if, upon such candid and full reconsideration of the case, you come again to the conscientious conclusion that it is not within the provisions of the general law, then your official duty, imperatively demands that you adhere to your former decision. That, in my judgment, is the only view of the subject, compatible with the Constitution, or with genuine respect for the

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two Houses. If Congress shall afterwards, on its own reconsideration of the case, think otherwise, it will signify that conclusion in the constitutional form of a law for the relief of Bowman.

I am, very respectfully,

C. CUSHING.

Hon. ROBERT McCLELLAND,
Secretary of the Interior.

HOT SPRINGS OF ARKANSAS.

The Hot Springs in the State of Arkansas are the property of the United States, having been reserved from entry or sale by express act of Congress. None of the parties asserting title thereto either by pre-emption, location, or otherwise, present any satisfactory proof of such title as against the United States.

ATTORNEY GENERAL'S OFFICE,

August 30, 1854.

SIR: Your letter of the 6th of January submits to my consideration the conflicting claims of sundry parties to the Hot Springs, so called, in the State of Arkansas, and more especially the claim for a patent of one Langlais, or his assignee, Henry M. Rector.

You state the fact that your predecessor, Mr. Stuart, having, on the 10th of October, 1851, considered the whole subject, "refused to recognise the validity of either of said claims, and decided that the lands were, by virtue of the act of April 20th, 1832, (hereafter referred to) reserved for the future disposal of the United States;" and you express a doubt of your power as well as of the propriety of "reopening and reviewing the past action of the Department," and you request my advice on the subject.

If what your predecessor decided had passed from an opinion into a final act, that is, if any complete rights had been vested under it, I should not advise a revision of it under any circumstances. But so long as it is a thing *in fieri*, its lawfulness remains, in my opinion, subject to investigation. I do not un-

derstand that a plainly unlawful opinion of a Head of Department is closed against future inquiry in any case. Now what Mr. Stuart did was to refuse the application for a patent to any one of the claimants, on the assumption that the lands in controversy had been reserved from entry by Congress. That was an opinion merely; and if it was erroneous, and the erroneous opinion stands in the way of private rights, it does not appear to me that such an opinion constitutes a decision binding in all future time. On the contrary, it seems to me that, if you should find it to be plainly erroneous, it is in your power, and is your duty, to revise it, and to consider and decide upon its merits the question, whether anybody, or if anybody, who, is entitled to a patent for the Hot Springs.

It seems that Mr. Walker, while Secretary of the Treasury, formed an opinion upon the subject in favor of Langlais; but as that opinion did not pass into a final act, it did not bind Mr. Stuart, and in the same way Mr. Stuart's opinion does not bind you.

Now, on looking into the papers transmitted, the fact comes before me, that by two opinions of Mr. Attorney General Johnson, one of the 29th of April, 1850, and another of the 2d of May, 1850, he decided that Langlais was entitled to a patent; that the then Secretary of the Interior, Mr. Ewing, at first adopted that opinion, but afterwards suspended the issue of a patent because of a new adverse claim being set up by the heirs of one Belding; and thus, in this stage of the question, the matter came before Mr. Secretary Stuart.

So that, no final action having been had in the case, it being still a matter *in fieri*, the present question is, whether the law upon it was rightfully pronounced by Mr. Stuart.

The main question having been revived, and argued with great zeal by eminent counsel in the papers referred, and the counsel for Rector especially desiring "that the whole matter may be reconsidered and reinvestigated, and the full and deliberate opinion of the Attorney General had thereon," it seems to me desirable, and for the credit of the Government, to grapple at once with the difficulties of the case,—to solve, if they can be solved, the legal questions upon which the action of your

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Department depends,—and to bring the matter to conclusion upon some reliable premises of law. I shall proceed to examine the subject, in the hope, perhaps a vain one, of being able to afford the elements of such conclusion.

The Hot Springs of Arkansas are situated in the N.E. and S.E. quarters of section No. 32, and the N.W. and S.W. quarters of section No. 33, in township No. 2, S. of range 19, W. of the fifth principal meridian, in the Washington District, south of the river Arkansas, on lands ceded to the United States on the 24th of August, 1818, by the Quapaw Indians.

The several claimants to the Hot Springs, whose conflicting claims have been urged before me, are—

1. The claim of Rector, assignee of Langlais upon a certificate No. 467, issued by the Recorder under the act of February 17th, 1815, for the relief of sufferers by the earthquake at New Madrid.

2. The claim of Hale, for heirs of one Perciful for a pre-emption under the act of April 12th, 1814.

3. The claim of heirs of Belding for a pre-emption under the act of May 29th, 1830.

The opinion of Mr. Stuart, as we have already seen, was positive against all the claimants, and was reasoned out in a decision, which cuts off Langlais, Hale, and Belding alike. It adjudges, on full consideration, that their claims were wholly invalid, in face of the act of 1832, reserving the Hot Springs to the use of the United States.

Mr. Johnson's two opinions are very brief, the first without any reasons given, the second assigning his ground of decision summarily as follows :

“Waiving all the (other) grounds of title in Rector to the patent claimed, he is entitled to it by virtue of the act of the 19th of March, 1843.”

The relation of this act to the claim is not stated by Mr. Johnson; but that will appear in the course of the present opinion.

The act of April 20th, 1832, after making reservation of certain salt springs in the Territory of Arkansas, proceeds as follows : (iv Stat. at Large, p. 505 :)

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“Sec. 3. And be it further enacted, that the Hot Springs in said Territory, together with four sections of land, including said springs, as near the centre thereof as may be, shall be reserved for the future disposal of the United States, and shall not be entered, located, or appropriated for any other purpose whatever.”

We may concede, at least for the argument's sake, that the act of 1832 has no retrospection to undo what had been before lawfully done. It may be, that its operation is prospective only; declaring what shall be prohibited in future from being entered, located, or appropriated.

The words “shall be reserved” do not necessarily imply any resuming, taking back, annulling, or repudiation of that which had before been lawfully entered, located, or appropriated. This act does not offer any compensation for private property to be taken for public use. We are not bound to suppose that Congress intended a violent invasion of a private right and interest in any portion of the land described and lawfully acquired under previous laws; for such an act would be in apparent disregard of the Constitution of the United States.

Mr. Stuart assumes that the case of *Stoddard v. Chambers*, (ii Howard, 284,) as applied to the act of 1832, disposes of the claim of Rector. That is true, if there was no survey and location by him until after 1832; but otherwise it does not; for that was a case of location made on lands reserved; and it by no means decides that a valid location, made prior to the act of 1832, was expropriated by that act, or that it prevented the consummation of such previously acquired appropriation.

On the other hand, the tenor of the act of 1832 conclusively shows, that Congress understood the land of the Hot Springs to be still unappropriated public domain. It knew that none of this land had been patented; it knew by its own legislation, as will hereinafter be fully explained, that no pre-emption rights could have attached to the land; and, upon such information as the documents in the office of the Commissioner of Public Lands could furnish, there would be no reason to suppose that any valid New Madrid location had been made at the Hot Springs. It may well be that Congress shall have passed an act, which,

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in terms, is incompatible even with any previous inchoate appropriation of the Hot Springs.

However this may be, it is perfectly evident, that Langlais Belding, or anybody else, in order to be entitled to a patent, must make proof of an appropriation of the Hot Springs anterior to the date of their reservation by the United States.

But great reliance, in behalf of Rector, is placed on the act of March 1st, 1843, as if that abrogated, *pro tanto*, the previous reservation of the Hot Springs. This idea will be dissipated at once by the least attention to the terms of the act. (v Stat. at Large, p. 603.)

The act provides, (sec. 1,) "That the locations heretofore made of warrants issued under the act of 17th February, 1815, * * * for the relief of the inhabitants of the late county of New Madrid, in Missouri Territory, who suffered by earthquakes, of those locations which were made on the south side of the Arkansas river, if made in pursuance of that act in other respects, shall be perfected into grants in like manner as if the Indian title to the lands on the south side of said river had been completely extinguished at the time of the passage of said act."

"Sec. 2. That in all cases, in which the location so made on the south side of the Arkansas river may have been sold, * * * the owner of the warrants issued under the provisions of the act aforesaid, shall have the right to enter, * * * without payment, the like quantity of the public lands * * * in the State of Arkansas."

Now, be it observed, there is in this act no mention of the Hot Springs. It describes geographically a district of country, which district comprehends the Hot Springs; but it is not an act specifically applicable to the Hot Springs.

Be it remembered, also, that a general provision of law, authorizing pre-emption or other privileged locations on the public lands, does not attach to or cover an existing reservation therein by the United States. (*Wilcox v. Jackson*, xiii Peters, 513.)

Moreover, it is perfectly self-evident in this act also, that so far as regards a New Madrid location, the act cures no defect except one, and that is:—The non-extinguishment, at the time

of the passage of the act of 1815, of the Indian title to the lands on the south side of the river Arkansas. Such a location to be valid, must, by the very terms of the act of 1843 itself, have been "made in pursuance of that act (of 1815) in other respects." If the non-extinguishment of the Indian title be the flaw in Rector's case, then Mr. Johnson's opinion is well founded, if not, not.

The New Madrid act provides, in its 1st section,

"That any person or persons owning lands in the county of New Madrid, in the Missouri Territory, * * * and whose lands have been materially injured by earthquakes, shall be, and they hereby are, authorized to locate the like quantity of land on any of the public lands of the said Territory, the sale of which is authorized by law: Provided," &c. (iii Stat. at Large, p. 211.)

Many years ago it was ruled by Mr. Wirt, that words in an act of Congress, authorizing pre-emption of lands, "the sale of which is authorized by law," exclude the right of pre-emption from all lands, the sale of which had not been authorized by law *at the date of the pre-emption act*. Mr. Wirt's decision was right in the given case; but the reason was unsound, at least if intended as affirming that, as a general proposition, the words in an act,—"*the sale of which is authorized by law*,"—confine the inquiry to the question whether the sale was authorized or not *at the date of the act*. (See Mr. Wirt's opinion of Dec. 4th, 1826, ante, vol. ii, p. 42.)

I do not entertain the least doubt that a New Madrid location, made on lands, the sale of which was authorized at the time of the location, would be a good location, whatever might have been the condition of the lands at the time of the New Madrid act. All difficulty on that point is disposed of in my mind, first, by conviction that, in general doctrine, the word "is" in the act of 1815 has reference, not to the date of the law, but to the date of the thing to be done under it; secondly, by the decision of the Supreme Court in *Barry v. Gamble*, (iii Howard, 32, 54,) which decides that a New Madrid location might be made on lands not surveyed or proclaimed; and thirdly,

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by the act of 1843, which removes all difficulty arising from occupancy of the Indians.

Restoring the word "is" in the act to its only true and legitimate construction, we find that the act of 1843 does not affect Rector in the least degree; for he does not pretend to have made or applied for any location until the 26th of November, 1818, or the 17th of January, 1819, and subsequently therefore to the Quapau cession of the Hot Springs, which was August 24th, 1818, at which date the title vested in the United States. We may, therefore, throw the act of 1843 wholly out of thought, so far as regards Langlais, to resume the critical question in his case, whether, as the act of 1843 expressly requires to be determined, he had, conformably to the provisions of the New Madrid act "in other respects," appropriated this land, either in equity or law, prior to its being reserved by the United States.

The history of the Langlais claim, upon the papers transmitted to me from the General Land Office, appears to be as follows :

1. The earliest document in the series is the following :

"Missouri Territory, County of St. Louis. I do hereby assign, transfer, and set over, all my right, title, claim, and interest, for myself, and as attorney in fact for Francis Langlais, to or in the within certificate, and all the benefits and rights to be derived therefrom, to Samuel Hammond, his heirs and assigns, for and in consideration of the sum of six hundred and forty dollars, which sum I have received from the said Hammond in full consideration for the premises aforesaid. Witness my hand this 4th January, 1818. Jas. Story, attorney in fact for Francis Langlais."

2. The next document in date is the certificate, dated, "Office of the Recorder of Land Titles, St. Louis, November 26th, 1818," and signed "Frederick Bates," which sets forth that, upon proper proof made to him, it appears that under the New Madrid act, "Francis Langlais, or his legal representatives is entitled to locate two hundred arpens of land on any of the public lands of the Territory of Missouri, the sale of which is authorized by law."

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3. On the 17th of January, 1819, A. Hammond and Elias Rector applied to William Rector, Surveyor General of Public Lands for the State of Illinois and Territory of Missouri, "for the entry and donation of 200 arpens of land," to satisfy the certificate to Langlais or his legal representatives, "to be surveyed in a square tract," and so described "as to include the Hot Springs."

4. The next material document in order of time, certified to me from the General Land Office, is a certificate of survey "for Langlais or his legal representatives," made and dated February 28th, 1838, by "John C. Hale, D. S.," and approved April 23d, 1838, by "Edward Cross, Sur. Pub. Lands."

5. Finally, the survey, thus approved, was recorded June 16th, 1838, in the office of the Recorder of Land Titles at St. Louis.

In the opinion rendered by Mr. Stuart, and in the report of facts from the Land Office, on which that opinion is based, the survey by Hale is dated 1828, (one thousand eight hundred and twenty-eight.)

I do not know where this capital error had its origin. The true date is stated above, 1838, (one thousand eight hundred and thirty-eight.)

It is a minor question in the case, but one proper for the Department to consider, whether, supposing any location to have been made under Langlais, the interest is regularly deduced, through these or any other documents on file, from Langlais to Henry M. Rector, the actual claimant. That is to say, this point would have to be considered if the case were otherwise a clear one; for nowhere, in the course of it, from the original assignment down, does Langlais himself appear in person, in any document which has passed under my eye.

But the main question, whether the certificate issued to Langlais or his representatives had been so proceeded upon as to constitute an incipient equitable claim to a specific and identical tract of land at the Hot Springs antecedent to the act of 1832, —which reserved the Hot Springs and the four surrounding sections for the future disposal of the United States, so as not to be "entered, located, or appropriated for any other purpose whatever,"—depends upon the true construction of the act of

1815, authorizing persons owning lands in the county of New Madrid, and materially injured by earthquakes, "to locate the like quantity of land on any of the public lands of said Territory, the sale of which is authorized by law."

The certificate issued for Langlais by the recorder of land titles, that he was one of the sufferers by the earthquakes, and therefore entitled to locate the quantity certified, was not of itself an appropriation of any particular tract of land,—it was but an authority to locate the quantity mentioned in the certificate. It was the statute evidence and authentication of the original right of Langlais, but neither conferred nor pretended to confer anything but a warrant on which to make application to the surveyor, which was to be the next step.

What, then, was the legal effect of the application to the surveyor? In the arguments of counsel, in cases reported, and elsewhere, it is occasionally spoken of as an *entry*. That is a very indefinite word, which may signify something or nothing, according to circumstances. It is much safer to adhere to the statute word "application," and to decide on its legal effect by the tenor and context of the statute itself. The material point is, what is a location?

The second section of the act explains what is a location in these words:—

"And upon such certificate being issued, and the location made, on the application of the claimant, by the principal deputy surveyor for said Territory, or under his direction, whose duty it shall be to cause a survey thereof to be made, and to return a plat of each location made to the said recorder, together with a notice in writing, designating the tract or tracts thus located, and the name of the claimant on whose behalf the same shall be made; which notice and plat the said recorder shall cause to be recorded in his office." * * *

"Sec. 3. That it shall be the duty of the recorder of land titles to transmit a report of the claims allowed, and locations made under this act, to the Commissioner of the General Land Office, and shall deliver to the party a certificate stating the circumstances of the case, and that he is entitled to a patent for the tract therein designated,"&c. (iii Stat. at Large, 211.)

It is inconceivable how any uncertainty could ever have existed as to the purport of these provisions ; for the language is definite and explicit.

What is the "location" of the statute ? Is it any act of the party himself ? Does his application to the recorder for the original certificate, or that certificate itself, or the application to the surveyor, constitute a location ? By no means. The location is made by the principal deputy surveyor, or under his direction, according to the express terms of the act. That location is the actual survey and return of the plat by the surveyor to the recorder. Until then there is no location. Until then there is no severance from the public domain. Until then there is no commencement of title. Until then no scintilla of equitable right vests in the party. Until then it is land which he has in his mind, and contemplates acquiring, but he has not acquired it, and the United States may lawfully sell and patent it, or take it in reserve for the uses of Government.

Accordingly, this, the obvious and the natural import of the statute, has been adjudged to be the law by the Supreme Court.

In the case of *Bagnell v. Broderick* the court say :

"The United States never deemed the land appropriated until the survey was returned, for the reason that there were many titles and claims, perfect and incipient, emanating from the provincial governments of France and Spain, and others from the United States, in the land district where the New Madrid claims were subject to be located. So there were lead mines and salt springs excluded from entry. Then, again, the notice of entry might be in a form inconsistent with the laws of the United States ; in all which cases no survey could be made in conformity to it. * * * The location referred to in the act is the plat and certificate of survey returned to the recorder of land titles ; because by the laws of the United States, this is deemed the first appropriation of the land, and the legislature of Missouri has no power, had it made the attempt, to declare the notice of location filed with the Surveyor General, to be an appropriation, contrary to the laws of the United States." (*Bagnell v. Broderick*, xiii Peters, 436, 447, 450.)

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Again, in *Barrey v. Gamble* (*ubi supra*) the Supreme Court of the United States, speaking of the recorder's certificate to Lafleur, for 640 acres of land, in compensation for land injured by the earthquake in New Madrid county, said:—"On this the survey of April, 1815, is founded. Its return by the Surveyor with a notice of location to the Recorder, was the first appropriation of the land; and not the notice to the Surveyor General's office, requesting the survey to be made, as this court held in *Bagnell v. Broderick*, xiii Peters, 450."

These adjudications show that the incipency of the claim to the Hot Springs, by the proceedings on the New Madrid certificate to Langlais, was not the notice to the Surveyor General's office, requesting the survey to be made; but the survey and return, whensoever they may have been made and recorded.

The officers of the Government, therefore, have erroneously discussed this claim, on the supposition that the application for a survey in 1819 was a location. It was no more an appropriation of the land than looking at it would have been an appropriation.

I cannot suffer myself to question or doubt that such is the law, in view of the language of the act, and of these peremptory and explicit declarations of the Supreme Court. There are several subsequent statutes regarding New Madrid locations. See act of April 3d, 1818, (iii Stat. at Large, p. 417), act of April 26th, 1822, (iii Stat. at Large, p. 608), act of March 2d, 1827, (iv Stat. at Large, p. 219), and act of March 2d, 1830, (iv Stat. at Large, p. 482). But none of these statutes touch the present question. I am constrained therefore to the conclusion that, if the claim of Langlais (or of Rector) is to be determined by the documents transmitted to me from the General Land Office, it has no legal foundation to stand upon, as, according to those documents, and supposing other difficulties in it cleared up, still its inception dates from the survey made by Hale in 1838, that is five or six years subsequently to the reservation of the Hot Springs by the United States.

Such is the record case presented to the Department in behalf of Langlais, as exhibited in the report of the Commissioner of Public Lands to the Senate of the United States, of June

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10th, 1850, in the opinion and decision of Secretary Stuart, of October 10th, 1851, and the documents on which he acted, and in the copies of application and survey certified to me from the Land Office by the present Commissioner. My conclusion is based, of course, on the record case.

But, after having arrived at this conclusion, and made known the same to the claimant, he transmitted to me what purports to be the copy of a survey and location of the Langlais certificate, made by James S. Conway, D. S., on the 16th of July, 1820, and applied to the same tracts, which Hale surveyed and located on the 26th of February, 1838, as hereinbefore stated.

The document has annexed to it the following certificate, namely :—

“Surveyor’s Office, Little Rock, Ark., 23d Sept., 1850.

“This paper and a duplicate of the same, were left at this office, to be filed with the papers of New Madrid claim, certificate No. 467, on the 18th day of June, 1850, by Henry M. Rector, but are not of record here nor known as constituting any part of the official papers, connected with said claim.

“The duplicate was withdrawn by Henry M. Rector on the 12th day of September, 1850.

(Signed) “GEORGE A. WORTHEN, Ch’f. Cl’k.”

The paper in question, with the certificate annexed to it, comes to me as one of sundry copies, which are all authenticated in the following words, namely :

“I certify that the within and foregoing is a true and correct copy of the original papers on file in this office, *except the copy of the survey of James S. Conway, which is a private paper and not of record in this office.*

(Signed) “GEORGE WILBOURNE, Surveyor.

“General Surveyor’s Office, Little Rock, Ark., July 8th, 1854.”

At the same time, Mr. Rector has addressed to me earnest representations, accompanied with his affidavit, explaining and relying upon the alleged survey by James S. Conway in 1820, as the true basis of his claim to the Hot Springs.

These new documents, not coming to me from the Land Office, but directly from the party, raise a question of fact, which it

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does not belong to the Attorney General to investigate or settle, and which, in justice to Rector, should, it seems to me, receive the careful consideration of the Department.

The whole inquiry as to Rector's claim lies, in my judgment, within the narrowest possible compass.

Rector, alleging himself to be lawful assignee of a New Madrid certificate duly issued in the right of Langlais, claims an equitable title to the site of the Hot Springs.

The Hot Springs were, by act of Congress passed in 1832, reserved for the future disposal of the United States.

That act, whether it did or not undo or annul a pre-existing private appropriation of the land, if there was any such, yet absolutely forbade, and effectually prevented, any subsequent private entry, location, or appropriation thereof, until further order of Congress. But, under the series of acts relating to New Madrid locations, as repeatedly construed by the Supreme Court of the United States, there is no location, no appropriation of public lands, under a New Madrid certificate, until actual survey and return of the plat to the recorder of land titles.

It remains, then, for Rector to satisfy the Department that Langlais, or any person lawfully holding under him through whom Rector may derive, had appropriated this land according to law prior to the date of the act reserving it from entry. After which, and not until then, it will be necessary to consider and determine the question whether that act was intended, and has the legal effect, to expropriate land appropriated, and revest the same in the United States, so far at least as to preclude the issue of a patent by the General Land Office.

As to the claims of the heirs of Perciful and Belding, and other claimants, they are all cases of pre-emption under different acts of Congress, and in my judgment they were properly and rightfully rejected by Mr. Stuart. I deem it unnecessary to recapitulate their legal merits, more especially as suits are now pending in Arkansas in the name of Belding against occupants of the Hot Springs.

It appears that, after the decision of Mr. Secretary Stuart, rejecting all these claims to the Hot Springs, and asserting the title of the United States against them all, application was

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made to the Commissioner of Public Lands in behalf of Belding, to allow an entry to be made in his name. This application was rejected by the Commissioner, but allowed by the Secretary on appeal. I think this act is to be regretted. Either, in the judgment of the Secretary, Belding had a good claim, or he had not. If he had a good one, he should have received a patent. But the Secretary had already decided against Belding's claim. Having so decided, it was injudicious to recur to the half measure of admitting him to entry. It seems particularly unfortunate that entry by Belding was allowed, because his claim was for a pre-emption under an expired statute, and one of the objections to it was that he failed to make entry in the time prescribed by law. The Department rejected his claim, because not entered in season, yet permitted him to make entry notwithstanding. It seems to have been a case, if there can be any, in which to maintain unflinchingly the primary position of the Department.

The object was to enable Belding to commence actions of ejectment under the statute of the State of Arkansas, which provides that the action may be maintained, "In all cases where the plaintiff claims the possession of the premises, under or by virtue of, first, an entry with the register and receiver of the proper land office of the United States; second, a pre-emption right under the laws of the United States." (Rev. Stat. of Arkansas, ch. 53, sec. 2, p. 344.)

It is edifying to see actions of ejectment, having for their purpose to dispute the title to parcels of the public domain, between parties, none of whom pretend anything but an equitable interest, and neither of whom has in fact any title as against the United States, legal or equitable.

The parties may eject one another, *ad libitum*; and the party prevailing may thus get up a fallacious appearance or semblance of title, but the fee still remains in the United States. (*Bag-nell v. Broderick*, xiii Peters, 449, 450.) For Congress alone has the power to declare the rule of titles to the public domain; it has accordingly declared a patent to be the superior conclusive evidence of title; and until that issues the fee is in the Government.

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Or if, under any possible decision of the courts of Arkansas, rights are to be set up against the United States in consequence of Belding, a pre-emption claimant rejected by the Land Office, making a more plausible show, in law, than Hale, Perciful, or some other rejected pre-emption claimant, or than some person in occupation as a mere trespasser, then it is matter of great consideration, whilst these suits are pending in the State of Arkansas, on the supposition of pretended title of individuals to parcels of the public domain, whether the Government of the United States ought not to intervene, in some way, itself, to defend its own rights, which may perhaps be seriously prejudiced by these proceedings. I suggest this for the consideration of yourself and the Commissioner of Public Lands.

In conclusion, my opinion is that, with the reservation of the fresh points of inquiry which have turned up in regard to the Langlais claim, the decision of Mr. Stuart, that none of these parties have a valid claim to the Hot Springs, was correct, and ought to stand as the determination of the Department, unless, upon full examination of the new case presented in behalf of Rector, it should appear that he had acquired a title under Langlais, of date anterior to the time when the land was reserved from public entry for the future disposal of the United States.

I am, very respectfully,

C. CUSHING.

Hon. ROBERT McCLELLAND,
Secretary of the Interior.

 POWER OF THE PRESIDENT.

A deed of land, purporting to be by a certain Indian, and approved as such by a former President, proves not to have been executed by said Indian:—
Held, that the new President may treat that deed as nullity, and approve a new deed duly executed by such Indian.

ATTORNEY GENERAL'S OFFICE,
September 10, 1854.

SIR: By your letter of the 31st of July last, and the report

Power of the President.

of the Commissioner of Indian Affairs, with other papers accompanying the same, it appears—

That under the provisions of the treaty with the Potawatomie tribe of Indians of October 16th, 1826, Art. vi, (vii Stat. at Large, p. 297, 299), a quarter of a section of land was reserved for and granted to Joseph Wolf, among other scholars of the Carey Mission School; the land so granted being excluded from conveyance by either of said persons or their heirs without the consent of the President of the United States;

That, on the 2d of June, 1838, a deed of said quarter section, purporting to have been executed by said Wolf in favor of John A. Hendricks, was approved by President Van Buren;

That, in point of fact, the above deed was executed by the father of the reservee, the latter being at that time a minor; and he, on arriving at full age, upon legal proceedings duly had before a competent judicial tribunal, obtained a decree annulling the same, after which, by compromise between the parties interested in the title, Ezekiel Thomas became the purchaser under Joseph Wolf, who has executed a deed to said Thomas;

And the question propounded to me is,—Whether it is competent for the President to approve the latter deed from the rightful reservee, notwithstanding the conveyance to Hendricks approved by President Van Buren?

As the deed approved by Mr. Van Buren was a mere nullity, it is, in my opinion, lawful and proper, and a due execution of the treaty, for the President now to approve the deed to Thomas.

I am, very respectfully,

C. CUSHING.

Hon. ROBERT McCLELLAND,
Secretary of the Interior.

Constitutionality of Law for Extradition of Fugitives.

CONSTITUTIONALITY OF THE LAW FOR THE EXTRADITION OF
FUGITIVES.

When a person is under arrest, for any cause, on the warrant of a competent judicial authority of the United States, such person cannot lawfully be discharged on *habeas corpus* by the courts of a State, and vice versa.

The act of Congress of September 18th, 1850, entitled "An Act to amend, and supplementary to, the act entitled An Act respecting Fugitives from Justice, and Persons escaping from the Service of their Masters,"—is a valid and constitutional act.

Certain persons, being under arrest in the State of Wisconsin by proper judicial authority of the United States, charged with obstructing the execution of the acts of Congress in the case of a fugitive from service, were discharged from arrest, on *habeas corpus*, by the Supreme Court of the State, for alleged unconstitutionality of the Extradition Act. Held, that such decision requires to be reviewed on writ of error by the Supreme Court of the United States.

ATTORNEY GENERAL'S OFFICE,

September 11, 1854.

SIR: Your letter of the 7th of June last, enclosing a letter of Mr. Sharpstein, District Attorney of the United States for Wisconsin, presents the following case:—

On a writ of *habeas corpus*, issued by a justice of the Supreme Court of the State of Wisconsin, at the relation of one Booth, at that time in the custody of Stephen V. R. Ableman, Marshal of the United States, on the charge of violating the provisions of law, regarding the extradition of fugitives from service, the judge assumed not only to retain jurisdiction, but also to discharge the party, on the alleged ground that the provisions of law aforesaid were contrary to the Constitution of the United States.

Subsequently, the case being carried by appeal to the Supreme Court of Wisconsin, the decision of the judge below was affirmed by the opinion of the majority of the court.

It is thus apparent that the present case affords a convenient opportunity for obtaining the opinion of the Supreme Court of the United States, the decision of which is alike desirable as well to the authorities of the several States as to those of the United States, on the following points, namely: first, what are the true limits of the jurisdiction of the State courts, to issue and determine writs of *habeas corpus* for the release of persons

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held in confinement under lawful order of the authorities of the United States? And, secondly, whether there be or not any valid constitutional objection to the acts of Congress, making provision for the extradition of fugitives bound to service in any State.

The determination of these two questions will serve to relieve the courts of the United States from those conflicts of jurisdiction which, in consequence of the existing uncertainty as to the true limits of judicial discretion in cases of habeas corpus, have recently arisen, not in Wisconsin only, but also in Ohio, in Pennsylvania, and in New York.

For this reason, special counsel was employed by direction of the President to argue the case before the Supreme Court of Wisconsin; and it seems to me important that it shall now be carried up by writ of error to the Supreme Court of the United States.

I am, very respectfully,

C. CUSHING.

F. B. STREETER, Esqr.,
Solicitor of the Treasury.

 CONSTRUCTIVE PARDON.

The order of the Secretary of the Navy to an officer, while under sentence of suspension, to attend a court martial as a witness, does not operate as a constructive pardon.

ATTORNEY GENERAL'S OFFICE,
September 12, 1854.

SIR: Your communication of the 8th of August presents the following facts, and questions of law arising thereon, namely:

In April, 1851, Lieutenant Fabius Stanley was sentenced, on trial by court martial, to be dismissed from the service, which sentence was mitigated, by the President, to suspension from service and pay, for the term of twelve months.

On the 31st of October, 1851, and, therefore, during said term, Lieutenant Stanley received from the acting Secretary of the Navy, a letter in these words:—

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"You will attend without delay as a witness before a Court of Inquiry at the navy yard, Brooklyn, New York."

Lieutenant Stanley, it would seem, attended as required, and claimed and was allowed the usual compensation of a witness, by the decision, as it is said, of the Second Comptroller.

Whereupon, Lieutenant Stanley claims that these incidents are to be considered, in law, as a constructive pardon of the entire sentence by the President.

I am not aware of any principle of law to justify this pretension.

The hypothesis of Lieutenant Stanley, in this case, obviously assumes, that, to be summoned as a witness, and to receive pay therefor, is equivalent to being ordered upon the service and receiving the pay of his official rank, as lieutenant.

That assumption is plainly erroneous. Any person, having knowledge of facts to communicate to the court, whether he were of the Army or Navy, or neither, was subject to be called on to testify. To give testimony as a witness, and to have command or other duty as a lieutenant in the Navy, are very different things. Appearing as a witness before a naval court martial, no more operated to condone or pardon the sentence of Lieutenant Stanley, than would the same act, performed by a citizen, convert him into a lieutenant.

Lieutenant Stanley's erroneous construction of the legal consequences of these facts may have arisen from the circumstance that he received the order of attendance from the Secretary of the Navy. But an officer, though under suspension, does not cease to be an officer, subject to the military law, and, in all things lawful, subject also to the order of the President.

Nor can it be pretended that a pardon was necessary to make Lieutenant Stanley a competent witness, and that therefore the bringing him forward as a witness by order of the Department was, in effect, a pardon by the President.

If Lieutenant Stanley had been ordered on duty and command as a lieutenant, that would have been an *express* remission, not of the whole sentence, but of the unexecuted residue of the sentence. But his being ordered to testify was not, in my opinion, a remission, either express or constructive, of the remain-

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ing part of the sentence, and still less was it the annulment of the whole sentence, as claimed by Lieutenant Stanley.

I am, very respectfully,

C. CUSHING.

HON. JAMES C. DOBBIN,

Secretary of the Navy.

VIRGINIA BOUNTY LAND SCRIP.

An unliquidated claim to bounty land scrip in Virginia passes by a clause of general residuary devise.

An administrator of the estate with such will annexed, who, as such, received the bounty land warrant under the authorities of the State of Virginia, is entitled to receive the scrip in exchange from the United States.

ATTORNEY GENERAL'S OFFICE,

September 13, 1854.

SIR: I have duly considered the questions arising on the report of the Commissioner of Public Lands transmitted to me by your letter of the 6th instant.

It appears that a warrant issued on the 30th of December, 1852, from the Land Office of Virginia, for 666 $\frac{2}{3}$ acres of land, to James M. Jeffries, administrator de bonis non, with the will annexed, of Henry Young, deceased, for the services of said Henry Young as Quarter Master General in the Virginia State Line, has been filed in the General Land Office, for which scrip is demanded by the said administrator.

The heirs at law contest the propriety of issuing the scrip to the administrator with the will annexed, to whom the warrant issued, and who presents it to be exchanged for scrip.

Henry Young published his will and testament, bearing date 11th February, 1817, in which Henry Young, nephew of the testator, was named executor. Letters of probate were granted, on the 8th of December, 1817, to the executor appointed by the will, in the county court of King and Queen county, of the State of Virginia, in which county the testator lived and died.

Afterwards, in the same court, administration de bonis non,

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with the will annexed, of the said Henry Young, was granted to John C. Richardson; upon whose death, letters of administration de bonis non, with the will annexed, of said Henry Young, were granted, in the same court, at the April term, 1850, to the present party, James M. Jeffries.

Henry Young, the testator, after various specific legacies and devises of his real and personal estate, declared his will and desire, "that the residue and remainder of my estate, both real and personal, not hereinbefore bequeathed, be sold by my executor, and, together with any money due me, or any to be recovered by him, be applied first to the payment of any debts I may leave unpaid, and the balance, if any, I give and bequeath to be equally divided among John W. Howard, Patsey W. Williamson, Warner Howard, Rebecca Shephard, and Patsey Jones, to them and their heirs and assigns for ever."

Upon these facts it is to be observed:

1. That the county court of King and Queen county, wherein the testator lived and died, had jurisdiction to grant letters of probate and letters of administration de bonis non, cum testamento annexo; and therefore the grant of such letters with the will annexed to Jeffries must be deemed correct, until reversed or annulled by a competent appellate tribunal; no power to do which rests in the executive authorities of the United States.

2. The testator, before the making of his testament, possessed an incipient right to this land bounty by reason of his services in the war of the Revolution, and the laws of Virginia in that behalf made and provided; and this incipient or inchoate estate and interest was devisable by the laws of Virginia.

3. The testator, Henry Young, did not die intestate as to this interest in the land bounty promised by the State of Virginia, but testate, and therefore the officers of the State of Virginia properly issued the warrant according to the will and testament, and not to the heirs as if in case of intestacy.

4. Hence the administrator with the will annexed, who received the warrant, is, in my opinion, the person to whom the officers of the United States should grant scrip in exchange for the said land warrant, in pursuance of the laws of the United

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States in such cases made and provided. Of course the said administrator de bonis non, cum testamento annexo, must account for the proceeds to the creditors of the testator, if any, and to the legatees named in the residuary clause of the will of said Henry Young.

I am, very respectfully,

C. CUSHING.

Hon. ROBERT McCLELLAND,

Secretary of the Interior.

NAVY PENSIONS.

When an individual by name is placed on the roll of navy pensioners by special act, he becomes entitled only to such allowances and under such circumstances as if he had been placed on the roll in the ordinary course of administration, in common with all other pensioners of the same class.

ATTORNEY GENERAL'S OFFICE,

September 14, 1854.

SIR: Your communication of the 7th of April last referred to me the claim of Lieutenant Brownell, of the Navy.

It appears from the papers in the case, that Mr. Brownell acted as a sailing-master on board of the Lawrence, under Commodore Perry, in 1813, and received injury, but not such as to bring his case within the general provisions of law. Thereupon he applied to Congress for special legislation in his behalf; and a private act was passed in 1842, giving him the pension of his grade, \$10 per month, from 1827 to 1840: the provision being that he should be "placed on the roll of navy pensioners at a certain rate, for a disability incurred by him while in the discharge of his duty as a master on board the Lawrence." (vi Stat. at Large, p. 869.)

Subsequently, in 1847, Mr. Brownell obtained from Congress another special provision in the premises, as follows:

"Be it enacted, &c., That the name of Thomas Brownell be placed upon the roll of navy pensioners, and that he be paid ten dollars a month, commencing on the first day of October,

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eighteen hundred and forty, for disability incurred by him while in the discharge of his duty as master on board the *Lawrence*, &c., the payment of said pension to be subject to the provisions of the second section of an act passed August 16th, 1841, entitled 'An act for the payment of navy pensions.'" (ix Stat. at Large, p. 684.)

It should be observed, as explaining the occasion of this proviso, that Mr. Brownell had also received promotion to the rank of lieutenant, which he now holds.

It does not clearly appear, from the papers before me, what the precise injury sustained by Mr. Brownell was; the whole case, however, shows that the disability was not comprehended in any general rule of classification; the special act in his favor treats it as half disability only, in giving to him no more than half-pension; and the injury, instead of being such as to induce him to accept lower service or civil service, did not prevent his seeking and obtaining the appointment of lieutenant, and receiving the pay of his grade, as he may have been on duty, or waiting orders, or otherwise, according to the exigencies of the service, like other lieutenants of the Navy.

The second section of the act of 1841, above referred to, is in these words:

"No officer, seaman, or marine, entitled to a pension from the navy fund, who receives pay from the public treasury, shall receive more from the same fund than is sufficient to make the whole amount received from both the above-named sources equal to the pay fixed by law for the grade to which the officer, seaman, or marine may belong as an officer in the services in which he may be engaged during the year, so that no officer shall receive pay at the same time, both as a pensioner and an officer in service." (v Stat. at Large, p. 440.)

The idea contained in this act reappears in other acts of Congress. Thus, the act of April 30th, 1844, declares that "no person in the Army, Navy, or Marine Corps shall be allowed to draw both a pension as an invalid and the pay of his rank or station in the service, unless the alleged disability, for which the pension was granted, be such as to have occasioned his employment in a lower grade, or in some civil branch of the service." (v Stat.

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at Large, p. 657.) And the act of August 11th, 1848, while declaring that the act of 1844 shall not be so construed as to exclude officers, seamen, or marines from their pensions when disabled from sea-service, adds: "Provided, that the whole amount received by the pensioner, including pay for his services and pension, shall not exceed his lowest duty pay." (ix Stat. at Large, p. 283.)

Here, in all these acts, is a consistent and intelligent thought, namely, a pension for disability incurred, whether total or partial; but, if that disability be not incompatible with service, then exclusion of pension in cumulation of pay.

It is not necessary to justify this thought. It may suffice for the expositor of a law to state what the law is. But the thought is a reasonable one, it assuming that full justice will be done to the disabled officer, if he continue to receive the same rate of pecuniary allowance, and no more, as though he had never been subject to disability.

In further explanation of which, it may be pertinent to note the relation of the subject to the changes of the rates of pay in the Navy.

The "act for the more equitable administration of the navy pension fund," approved March 3d, 1847, provided, among other things, that the pension granted, or to be granted, to officers, seamen, or marines, disabled in the line of their duty, shall be considered to commence from the time of their being disabled, the amount to be regulated "according to the pay of the Navy as it existed on the 1st day of January, 1835." (v Stat. at Large, p. 180.)

The object of this provision was to prevent any question of the rate of pensions being changed with the change of the rate of pay in the Navy, enacted by the act of March 3d, 1835, (iv Stat. at Large, p. 755.) That is, the pensions were to continue on the footing of their primitive rate, as fixed with reference to the rate of pay when the pension fund was established.

There was change also in the designations of the pay; for, under the act of March 3d, 1835, three designations of pay exist; to wit, for lieutenants,—commanding, \$1800,—on other duty,

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\$1500,—waiting orders, \$1200,—whereas, by the old law, it was,—when under orders for actual service, so much,—when not under orders, but waiting orders, on leave of absence, or on furlough, “no more than half their monthly pay.” (ii Stat. at Large, p. 390.)

These considerations are material to the right understanding of the intendment of Congress in its various later enactments regarding the naval pension fund.

Such is the language of the statutes; and we come now to the legal question raised by Lieut. Brownell.

His right of pension is, by the special act in his favor, expressly made subject to the condition of the act of 1841. That condition is, that “no officer shall receive pay at the same time both as a pensioner and an officer in service.”

This provision is so plain, so clear, so definite, so precise, that, until instructed by the ingenious subtleties of self-interest, one is prone to wonder how any question of law can arise upon it.

But Mr. Brownell alleges that the words “an officer in service,” must be construed to signify an officer *on duty pay*, and that an officer waiting orders, or on furlough, is not an officer in service; and claims to have the pension cumulated upon his pay as lieutenant, at all times when he is not on duty pay.

This construction is contrary to the natural sense of the words of the law.

It is contrary to their established technical signification.

It is contradicted by the general tenor of acts *in pari materia*, and the ascertained spirit of the statutes changing or supplying this pension fund.

It is contradicted by two opinions of Mr. Attorney General Clifford, one of the 24th May, 1847, and another of the 2d of June, 1847. To be sure, in the latter of these opinions, Mr. Clifford recognised the fact, as a fact merely, that Mr. Badger, while Secretary of the Navy, had held* that the exception applied only to duty pay; but this fact did not change the meaning of the law, or the reconsidered view of it, as entertained, from the beginning to the end, by Mr. Clifford.

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The assumed equivocation is in the phrase "an officer in service," which the construction of Lieutenant Brownell alters into "an officer in *active* service." There is nothing in the reason or sense of the thing to justify this interpolation of the word "active" before the word "service."

And this construction forgets to consider that the proviso of the act of 1841 consists of two members, which are cumulative provisions, each of which explains the other; or, to speak more exactly, the second member is connected with the first in such-wise as to stand as its legal effect, and they are complementary one to the other. Now, it is notable, that in each of these complementary or cumulative members of the proviso, the debatable substantive occurs, but in different senses.

Let us recur to the proviso. It runs thus: "No officer, entitled to a pension from the Navy Pension Fund, who receives pay from the public treasury, shall receive more from the same fund than is sufficient to make the whole amount received from both the above-named sources equal to the pay fixed by law, for the grade to which the officer may belong, as an officer *in the services in which he may be engaged during the year.*" Here is obvious distinction of varieties in the nature of "the services" performable, by a given officer, during the year. After which, the proviso proceeds: "*So that* no officer shall receive pay, at the same time, both as a pensioner and an officer in service." Now, it is impossible to give coherence and compatibility of sense to these two members of the proviso without rejecting the hypothesis of construction assumed by Lieutenant Brownell.

There is another material class of considerations.

The act for the special benefit of Lieutenant Brownell, passed in 1847, is careful to re-enact, for his case, the proviso of 1841. But does it repeal the then existing universal prohibition of the act of 1844? By no means; no more than it repeals the detailed general provisions of law establishing the Navy Pension Fund, such as the jurisdiction to adjudicate in the premises, which the laws confer on particular accounting officers of the Treasury.

Now, the prohibition of the act of 1844 is explicit and peremptory beyond all equivocation or cavil. The act declares, as

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we have seen, that "no person in the Army, Navy, or Marine Corps, shall be allowed to draw both a pension as an invalid and the pay of his rank or station in the service," except in a specified case not pertinent to the present inquiry. Here is a permanent standing law, applicable in express terms to all persons, whether of the Army, Navy, or Marine Corps. The Fourth Auditor states that this act is uniformly construed, and it must of necessity be construed, as suspending, with the irrelevant exception above referred to, the pension of every invalid, while receiving *any rate of pay* in the Army, Navy, or Marine Corps. "No person in the Navy," says the law. Is not Lieutenant Brownell a person in the Navy? Assuredly. This lieutenant is placed on the pension roll according to his original grade, by a special act of legislative grace, instead of by the general operation of law; but he is not the less a lieutenant, subject to all the ordinary provisions of law, applicable to his official condition, in common with his fellow lieutenants, and subject, as an officer, on the pension rolls, to the general provisions of law in that relation, just as much as he is to any other statute whatever, affecting the rights or duties of an officer of the Navy; and he ought not to imagine it to be possible that, by any construction, forced or unforced, of a special act, he is to be placed above any and every other officer of the Army, Navy, or Marine Corps.

For, as rightly intimated by the Second Comptroller, to admit the unnatural construction which Lieutenant Brownell ascribes to the law, would be to impute to Congress an act of extraordinary and most incomprehensible personal partiality to him, and of the most palpable relative injustice to every other officer of the Army, Navy, and Marine Corps.

The case, in that relation, stands thus: A long line of gallant men, who came clearly within the general provisions of law for the benefit of officers of the Navy incurring disability in the discharge of their duty, have been recognised accordingly as entitled to a share of the Navy Pension Fund. Not one of these officers, however exalted his personal merits, however severe the wounds he may have received or the maladies he may have contracted in service, can be allowed to draw both a pension as an

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invalid and the pay of his rank or station in the service, unless the disability be such as to compel him to accept employment in a lower grade, or in some civil branch of the service. Mr. Brownell did not come within the general law: he was added to the roll by an act of exceptional favor on the part of Congress. Did Congress, while granting to him this favor, design furthermore to extend to him the most unparalleled privilege of being exempted from all the general conditions of service and pay, which attach to every other pensioned officer of the Army, Navy, and Marine Corps? That his name should stand on the pension roll, a solitary exception of privilege among all the names which honor it? And for what conceivable reason should any such invidious preference have been arrogated for him over all other officers in the service? It was not so done, nor was it so intended. It would be utterly impossible to believe that Congress intended this, even though it were explicitly enacted in terms the most unequivocal: it would be necessary, in such case, for the vindication of the honor of the Government, to suppose that the law had received the votes of the two Houses, and the approbation of the President, through mere inadvertence, or under the influence of some strange hallucination.

But no such painful necessity exists in the present case. There is not, in my opinion, a *penumbra* of legal right in the *claim* of Lieutenant Brownell, and it stands in conflict with all justice and equity. By the express terms of the special act for his benefit, and its manifest relation to other laws *in pari materia*, he is placed on the pension roll, not as a privileged person, superior to the general rule of justice and law, to have, he alone, at the same time, unconditional pension and pay: on the contrary, he is, in that respect, to take his lot in common with all other officers of the Army, Navy, and Marine Corps.

I am, very respectfully,

C. CUSHING.

Hon. ROBERT McCLELLAND,
Secretary of the Interior.

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MICHIGAN UNIVERSITY LANDS.

Under an act of Congress, granting to the State of Michigan a certain number of sections of land for the use of a university therein, the State selected, applied for, and received the requisite number of sections, some of the sections, thus deliberately selected, being fractional sections:—

Held, that the State cannot now revise its selections, and obtain additional lands to make the sum total of acres what it would have been if all the selections had been complete sections.

ATTORNEY GENERAL'S OFFICE,

September 15, 1854.

SIR: I have considered the question presented by your letter of the 1st of October last.

The act "making provision for the disposal of the public lands in the Indiana Territory, and for other purposes," approved March 26th, 1854, (ii Stat. at Large, p. 279,) after establishing three land districts depending on Vincennes, Kaskaskia, and Detroit respectively, enacts, in section 4th, "That all the lands aforesaid, not excepted by virtue of the preceding section, shall, with the exception of the section numbered 'sixteen,' which shall be reserved in each township for the support of schools within the same, with the exception also of an entire township in each of the three above-described tracts of country or districts, to be located by the Secretary of the Treasury for the use of a seminary of learning, and with the exception also of the salt springs and lands reserved for the use of the same, as hereinafter directed, be offered for sale to the highest bidder, under the direction of the Surveyor General," &c.

By the act of Congress, approved May 20th, 1826, (iv Stat. at Large, p. 180, chap. xc,) the Secretary of the Treasury * * is hereby authorized to set apart and reserve from sale, out of any of the public lands within the Territory of Michigan, to which the Indian title may be extinguished, and not otherwise appropriated, a quantity of land not exceeding two entire townships, for the use and support of a university within the Territory aforesaid, and for no other use or purpose whatever, to be located in tracts of land corresponding with any of the

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legal subdivisions into which the public lands are authorized to be surveyed, not less than one section; one of which said townships, so set apart and reserved from sale, shall be in lieu of an entire township of land directed to be located in said Territory for the use of a seminary of learning therein, by act of Congress, entitled 'An act making provision for the disposal of the public lands in the Indiana Territory and for other purposes,' approved March 26th, 1804."

On the 23d of June, 1836, "An act supplementary to the act entitled 'An act to establish the northern boundary line of the State of Ohio, and to provide for the admission of the State of Michigan into the Union on certain terms,'" was approved. (v Stat. at Large, page 59, chap. 121.) By this it was enacted:

"That in lieu of the propositions submitted to the Congress of the United States by an ordinance passed by the convention of delegates at Detroit, assembled for the purpose of making a constitution for the State of Michigan, which are hereby rejected; and that the following propositions be, and they are hereby offered to the legislature of the State of Michigan for their acceptance or rejection, which, if accepted, under the authority conferred on the said legislature by the convention which framed the constitution of the said State, shall be obligatory upon the United States. * * * *

"Second—that the seventy-two sections set apart and reserved for the use and support of a university by an act of Congress, approved on the 20th day of May, 1826, * * are hereby granted and conveyed to said State, to be appropriated solely to the use and support of such university, in such manner as the legislature may prescribe. And provided also, that nothing herein contained shall be so construed as to impair or affect in any way the rights of any person or persons claiming any of said seventy-two sections of lands under contract or grant from said university."

This and the other propositions, five in all, were accepted by the State of Michigan, as appears by the act of Congress for the admission of the State of Michigan into the Union, approved January 26th, 1837. (v Stat. at Large, p. 144, chap. vi.)

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From the length of time between the acts of May 20th, 1826, and June 23d, 1836, and especially from the language of the second proposition in the said act of 1836, one would reasonably infer that the Secretary of the Treasury had, before the date of the latter act, caused to be set apart and reserved from public and from private sale a quantity of land for the university, located in tracts of land "not less than one section" each, and seventy-two in number, not exceeding two entire townships."

But it appears, from the report of the Commissioner of the General Land Office, that the authorities of Michigan had been permitted to make their own selections of tracts of lands; that they selected, from time to time, tracts of land conformably to the subdivisions made by the Surveyor General, but some of which were less than one section, being fractional sections on the navigable rivers; that these selections made by the constituted authorities of Michigan were reported by the Governor to the General Land Office, and approved by the Secretary of the Treasury: the last of them having been reported on the 19th December, 1837, and, like the others, duly approved by the Secretary of the Treasury.

The tracts of land set apart and reserved for the university, in consequence of the act of May 20th, 1826, as approved, are seventy-two in number; but, inasmuch as some of them are less than one entire section, being fractional sections on the rivers, the actual contents of the seventy-two tracts, so selected and set apart, fall short, by one thousand six hundred and sixty acres, and ninety hundredths of an acre, of two entire townships, computing each township entire as containing thirty-six entire sections, and each entire section as containing six hundred and forty acres; the two entire townships as containing together forty-six thousand and eighty acres, each township at twenty-three thousand and forty acres.

The matter had so remained from 19th September, 1837, until the 22d September, 1853, when the Governor of the State of Michigan, by his letter to the Secretary of the Interior, has claimed the right to have set apart for the use of the university of Michigan, an additional quantity of one thousand six hundred and sixty-three acres, and ninety hundredths of an acre of the

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public lands of the United States, so as to make up the quantity of forty-six thousand and eighty acres, equal to two entire townships of land. This is the computation made by the Governor of the State of Michigan, and upon the basis of which he demands for the State a further grant from the United States.

On the other hand, the General Land Office computes the fractional tracts and river lots as so many sections, or so many aliquot parts of a section, corresponding with the approximation of the contents thereof: the effect of which will be to make the quantity already received seventy-one and a half sections; and the Commissioner thinks that this half section may yet be allowed to the State.

And the question is,—Whether the additional quantity claimed by the State, or that suggested by the Commissioner, can be now allowed and legally granted in execution of the act of Congress.

That Congress intended, by the act of 1826, that the territorial government, now the State of Michigan, should have, for the support of its university, a quantity equal to two entire townships, is clear, on the express terms of the act. But it is equally clear by that act, and also by the act of 1836, that the grant of this quantity was upon condition that no tract of land, to be set apart and reserved from public and private sale, for the university, should be "less than one entire section or six hundred and forty acres."

This condition has a very apparent motive, namely, to prevent the selection, by small parcels, of the choicest lands, so as to leave the adjacent lands diminished in value by being severed from lots of greater value in respect of soil, timber, water, or locality relatively to the rivers. If adhered to, the restriction would have operated as a limitation of the average value of the whole quantity to be set apart for the university, and it would also have affected beneficially the value of the residue to be offered at public or private sale by the United States. The departure, by the act of the State, from this restriction, in taking tracts of less quantity than a section, was

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undoubtedly done because its effect was to enhance the value of the grant to the university.

It is equally clear, also, on the face of the law, that Congress intended to grant to the university but seventy-two tracts of land, consisting of the legal subdivisions of the townships, and that those tracts should not exceed in number seventy-two sections. The relevant conditions of the law are three,—namely, the sum total of two townships, subject to selection in complete sections of different townships, but only seventy-two on the whole number.

How the Secretary of the Treasury came to the conclusion to allow a legal subdivision less than a complete section of six hundred and forty acres to be set apart for the university, is a pertinent subject of inquiry. The solution given by the Commissioner of the General Land Office is, that, “where a tract other than a technical section was selected, it was, with the approbation of the authorities, confirmed as a section, it being optional with them to make a selection in the exact terms of the law, or to take a less tract as an equivalent therefor.”

This explanation assumes, that the Secretary of the Treasury construed the law as enacting that each section should be a complete section, only in the interest of the State; that, therefore, the State might waive this condition and accept a fractional section as if it were constructively a whole section; and that upon such waiver it was, that the selections, actually made by the Territory and the State, were approved and consummated by the United States.

But, in reply to this, it is now argued in behalf of the State, that “We were entitled to seventy-two full sections, and none of our State officers,—Representatives in Congress,—had the power of agreeing, on behalf of the State, to the contrary principle.”

May it not be pertinently said, on the other hand, that, so long as the State retains the fractional sections and does not propose to restore them to the United States, it, in effect, ratifies and confirms whatever was done in the premises, by the authorities of the Territory or State, however imperfect or de-

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fective may have been the commission, under which those authorities acted?

It is true that Congress directed to be set apart and reserved from sale, for the support and use of the university, a quantity of land "not exceeding two entire townships," to be located "in tracts of land, corresponding with the legal subdivisions, into which the public lands are authorized to be surveyed, not less than one section;" and, that it is extremely doubtful whether there was any power in the Secretary of the Treasury, the members of Congress representing the Territory or State of Michigan, its legislature, and its Executive, all combined, to dispense with the inhibition in the act of Congress against selecting any tract of "less than one section."

But, admitting this,—then, error has been committed on both sides, in carrying the act of Congress into execution. It was an error, however, committed at the request of Michigan, done for her benefit, and the advantage of which she still retains. The authorities of Michigan were indulged to make their selections of tracts of land. They selected some tracts of less than one section. The Secretary of the Treasury approved that selection, and the State of Michigan has the grant for the tracts of land so selected. Now, after the expiration of fifteen years or more from the last selection by the State and approbation by the Secretary, which made up all the seventy-two tracts of land promised by Congress, the State of Michigan comes forward, not to correct the error by surrendering the lands erroneously selected,—not to relinquish the benefits to Michigan, acquired by the concession of tracts of land of less than one section,—but asking to retain what has been heretofore selected and granted, and also to be permitted to select one thousand six hundred and sixty-three acres, being two whole sections, and a fraction of a section, in addition to the seventy-two sections or constructive sections, already received and still held and possessed by the State.

As it is not proposed to restore the fractional sections, erroneously selected and granted,—as the Governor of Michigan has no authority to restore them,—as, in fact, the mistake has

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run too long to be now capable of correction, the present request, made by the State, is, in effect and substance, to dispose of the uncorrected breach of the acts of 1826 and 1836, by committing a further breach of those acts. Those acts did not permit more than seventy-two tracts of land in the whole to be selected. The State selected and has received the entire number of seventy-two. It was for the benefit of the State, and by indulgence to it, that the Secretary of the Treasury undertook to treat the provisions of the law, in regard to the contents of each section, as directory only. If, in doing this, the law was violated, it seems conclusive to say that a breach of law, committed and suffered, affords no justifiable occasion for committing another and further breach. And, without such additional breach of the law, which expressly limits the total number of separate tracts to be granted, it seems impossible to concede to Michigan the addition of two whole sections and one fractional section, which she claims, or even the single additional fractional section proposed by the Commissioner of Public Lands.

I regret feeling constrained to come to this conclusion, being fully aware of the considerations of public utility, which lead to what is called a liberal construction of the provisions of law, making grants for the purposes of education to the several Territories and States. But, in the present case, the insuperable difficulty in my mind is in the fact that Michigan selected and accepted the fractional sections, because that selection was beneficial to her, and still retains them; and it seems to me to be an undue extension of the doctrine of liberal construction, to assume that the law, having been violated in one respect for the advantage of the State, it shall, on that account, be now violated anew, in order to give additional advantage to the State.

My opinion, therefore, is that the executive officers of the Government cannot lawfully suffer the State of Michigan to have, under the acts of 1826 and 1836, any additional tracts of land, great or small, and that the last selection, made by the State in 1837, and approved by the Secretary of the Treasury, is

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to be held as a final settlement of the question between the executive authorities of that State and of the United States.

I am, very respectfully,

C. CUSHING.

Hon. ROBERT McCLELLAND,

Secretary of the Interior.

WISCONSIN SCHOOL FUND.

By compact between the United States and the State of Wisconsin, when the latter was admitted into the Union, it was agreed that the United States would pay to the State five per cent. of the net proceeds of the sale of public lands within the same, for the use of its schools, provided that certain liabilities of the Territory of Wisconsin, on account of lands granted by the United States for canals therein, shall be paid and discharged by the State. Held, that the United States cannot make a set-off of the five per cent. school fund to pay the canal debt, because the former is a special trust fund; but that the United States may retain the money in trust itself until the State discharges its obligation in the other respect to the United States.

ATTORNEY GENERAL'S OFFICE,

September 18, 1854.

SIR: Your communication of the 15th of May submits the question, whether the United States have the legal right to retain or withhold from the State of Wisconsin the amount of the five per cent. of the net proceeds of the sale of public lands within that State, due the same for the support of schools therein, as a set-off to the sum due from the State to the United States, under the provisions of the act of Congress granting to the Territory of Wisconsin certain aid for the purpose of opening a canal to connect the waters of Lake Michigan with those of Rock river.

In order to understand thoroughly the relation of these two subjects, one to the other, and to prepare the way for stating and justifying the conclusions to which my mind has arrived on the question propounded, it becomes necessary to recount and explain the legislation of both governments in the premises.

By the act of 18th June, 1838, (v Stat. at Large, p. 245,) the United States granted to the Territory of Wisconsin a quantity

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of land in alternate sections and fractions, for aid in opening a canal to unite the waters of Lake Michigan with those of Rock river, with the provision that the main canal should be commenced in three years, and completed in ten years, "otherwise the United States to be entitled to receive the amount for which any of the said lands may have been previously sold."

Previous to this act, the territorial legislature of Wisconsin had incorporated, by act of 5th January, 1838, (to be seen in Bioren & D. ed. Laws U. S., p. 789) "The Milwaukie and Rock River Canal Company," which act of incorporation was seen and assented to by Congress in the ninth and tenth sections of the act of the 18th June, 1838, aforesaid, subject to the modifications then made by Congress.

One of these modifications was: "That the said canal, when completed, and the branches thereof, shall be and for ever remain a public highway for the use of the Government of the United States, free from toll or other charge whatever, for any property of the United States, or persons in their service, passing through the same."

Another was, that the future State of Wisconsin "shall be entitled to hold, in virtue of the grant hereby made, as many shares of the stock of said canal as shall be equivalent to the aggregate of all sums of money, arising from the net proceeds of the sales of said lands, and applied to the construction of said canal, anything in the charter of the Milwaukie and Rock River Canal Company, to the contrary notwithstanding."

Another was, that, for the purpose of securing a better price for the lands, and expediting the construction of the canal, "the territorial legislature of Wisconsin may borrow, upon a pledge of the said lands, such sum or sums of money as they may think expedient, and defer the sale of the said lands, or any part thereof, until such time or times, not exceeding two years beyond the period of completion of said canal, as they may deem expedient; and, for such sum or sums, so borrowed and applied to the construction of the canal, the State of Wisconsin shall be entitled to such interest in the stock of said canal as shall be equivalent thereto in amount."

Another was, that Congress might, at any time, until Wis-

consin should become a State, prescribe and regulate the toll, and that, thereafter, the State should possess the like power.

Some other modifications of the charter were made by Congress, not necessary to be mentioned here.

The sixth section of the act is in the following words:

"That the said State of Wisconsin shall be held responsible to the United States, and for payment into the Treasury thereof, of the amount of all moneys received upon the sale of the whole or any part of said land, at the price at which the same shall be sold, not less than two dollars and fifty cents per acre, if the said main canal shall not be commenced within three years, and completed within ten years, pursuant to the provisions of the act creating said canal corporation."

By the charter, as passed by the territorial legislature, the company were required to commence the canal within three years, and to complete it within ten years from the passage of that act; otherwise the charter to be forfeited, and the legislature to have the right to dispose of such parts of the unfinished canal "as to them should seem best calculated to promote the public interest."

It was provided also, that the future State of Wisconsin should have the right to purchase and hold, for the use of the State, the canal, with all its branches and other improvements, by paying to the corporation the amount actually expended in the construction, &c., together with such reasonable interest, not exceeding seven per centum per annum, as may be agreed upon."

"Provided, however, that, in case the Congress of the United States shall make any appropriation or donation, either in land or money, in aid of the construction of the work by this act authorized, the right to the same shall vest in said State, whenever the transfer of the said canal shall be made, and the net proceeds of all sales of land, and the amount of all money so appropriated or donated, shall be deducted from the amount to be paid to the said corporation for the transfer of said works to the State. And the said corporation are hereby authorized to apply to Congress for such appropriation in money or lands to aid in the construction."

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The alternate sections of land granted by Congress to the Territory of Wisconsin, along the line of the canal, to aid in its construction, were, under the laws of that Territory, and the terms of the amended charter of the canal company, sold and used by the company, except the quantity of 13,564 $\frac{1}{10}$ acres. But the corporation failed,—the Territory of Wisconsin declared the charter forfeited,—the canal has never been completed,—the project is abandoned,—the territorial government of Wisconsin suspended the sales of the before-mentioned 13,564 $\frac{1}{10}$ acres of land remaining unsold;—and we have now to deal with the liabilities, which this defunct undertaking may have devolved on the State of Wisconsin.

By act of Congress of the 4th of September, 1841, (v Stat. at Large, p. 453,) it was provided, in section 8th, that there should be granted to the States of Ohio, Indiana, Illinois, Alabama, Missouri, Mississippi, Louisiana, Arkansas, and Michigan, “five hundred thousand acres of land for purposes of internal improvements,” and it was further provided therein as follows:

“And there shall be, and hereby is, granted to each new State, that shall be hereafter admitted into the Union, upon such admission, so much land as, including such quantity as may have been granted to such State before its admission, and while under a territorial government, for purposes of internal improvement as aforesaid, as shall make five hundred thousand acres of land, to be selected and located as aforesaid.”

Afterwards, on the 6th of August, 1846, (ix Stat. at Large, p. 56,) Congress passed “an act to enable the people of Wisconsin to form a Constitution, and for the admission of such State into the Union,” which provides, section 7th, as follows:

“That the following propositions are hereby submitted to the convention, which shall assemble for the purpose of framing a constitution for the State of Wisconsin, for acceptance or rejection; and, if accepted by that convention, and ratified by an article in said constitution, they shall be obligatory on the United States.”

The fifth of these propositions is, “That five per cent. of the net proceeds of sales of public lands, lying within the State,

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which have been, or shall be sold by Congress, from and after the admission of the State into the Union, after deducting all expenses incident to the same, shall be paid to the State for the purpose of making public roads and canals in the same, as the legislature shall direct."

A convention of the people of Wisconsin assembled accordingly, and adopted a form of constitution for the new State, on the 16th of December, 1846, upon which, on the 3d of March, 1847, (ix Stat. at Large, p. 178,) Congress passed an act for the admission of Wisconsin into the Union as one of the States, the third section of which, so far as material to the present question, is in the following words, namely:

"The assent of Congress is hereby given to the resolutions adopted by said convention and appended to said constitution, and the acts of Congress, referred to in said resolutions, are hereby amended, so that the lands thereby granted, and the proceeds thereof, and the five per centum of the net proceeds of the public lands, may be held and disposed of by said State, in the manner and for the purposes recommended by said convention. Provided, however, that the liabilities by the territorial government of Wisconsin, under the act entitled, 'An act to grant a quantity of land to the Territory of Wisconsin, for the purpose of aiding in opening a canal to connect the waters of Lake Michigan with those of Rock river,' shall be paid and discharged by said State."

This same act, in section 4th, annexed as a condition to the admission of Wisconsin into the Union as a State, that the constitution adopted by the convention "shall be assented to by the qualified electors in the manner and at the time prescribed in the ninth section of the twentieth article of said constitution."

In point of fact, this constitution was not accepted by the people, and another convention assembled, which, on the 1st day of February, 1848, proposed a constitution in the form in which it was accepted by the people, and became the constitution of the State of Wisconsin.

Whereupon, Congress gave its assent anew to the admission of Wisconsin into the Union, by the act of May 29th, 1848,

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(ix Stat. at Large, p. 233,) which enacts, among other things, as follows:

"Sec. 2d. The assent of Congress is hereby given to the first, second, fourth, and fifth resolutions, adopted by said convention and appended to said constitution: and the acts of Congress, referred to in said resolutions, are hereby amended, so that the lands, granted by the provisions of the several acts, referred to in said first and fourth resolutions, and the proceeds of said lands, and the five per centum of the net proceeds of the public lands, therein mentioned, shall be held and disposed of by said State in the manner and for the purposes recommended by said convention; and, so that the lands, reserved to the United States, by the provisions of the act, entitled "An act to grant a quantity of land to aid in the improvement of the Fox and Wisconsin rivers, and to connect the same by a canal in the Territory of Wisconsin" and also the even-numbered sections, reserved by the provisions of the act entitled "An act to grant a quantity of land to the Territory of Wisconsin, for the purpose of aiding in opening a canal to connect the waters of Lake Michigan with those of Rock river," shall be offered for sale at the same minimum price and subject to the same rights of pre-emption as other public lands of the United States: Provided, however, that no person shall be entitled to a pre-emption by reason, &c., &c., and, provided further, that the liabilities incurred by the territorial government of Wisconsin, under the act, entitled "An act to grant a quantity of land to the Territory of Wisconsin, for the purpose of aiding in opening a canal to connect the waters of Lake Michigan with those of Rock River," hereinbefore referred to, shall be paid and discharged by the State of Wisconsin."

Thus, it is perceived, that the act of 1847 assents, in general terms, to certain resolutions of the first Convention of the people of Wisconsin, appertaining to certain lands granted, "and the proceeds thereof, and the five per centum of the net proceeds of the public lands;" with a proviso that "the liabilities of the territorial government of Wisconsin," under the act of Congress of June 18th, 1838, "shall be paid and discharged by that State;" and the act of 1848 assents to certain resolutions

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of the second Convention, the first and fourth resolutions especially, with a similar proviso, that the same liabilities "shall be paid and discharged by the State of Wisconsin." It needs only to describe in detail the action of the second convention as to the proposition made by Congress, in the act of 1846, because that action alone had legal effect.

The Constitution of Wisconsin (art. ii, sec. 2) provides as follows:

"The propositions, contained in the act of Congress, are hereby accepted, ratified, and confirmed, and shall remain irrevocable without the consent of the United States, and it is hereby ordained that this State shall never interfere with the primary disposal of the soil within the same by the United States, nor with any regulations Congress may find necessary for securing the title in such soil to bona fide purchasers thereof; and no tax shall be imposed on land, the property of the United States; and, in no case, shall non-resident proprietors be taxed higher than residents."

The same Constitution further provides, art. x, sec. 2, that "the five hundred thousand acres of land to which the State is entitled," under the act of 1841, "and also five per centum of the net proceeds of the public lands, to which the State shall become entitled on her admission into the Union,—if Congress shall assent to such appropriation of the two grants last mentioned,—shall be set apart as a separate fund to be called the School Fund," &c.

At the close of the constitution are five resolutions "appended to and signed with it," and "submitted therewith to the people of this Territory, and to the Congress of the United States."

Of these resolutions, the first and fourth, which are specially mentioned in the act of 1848, are the most important.

The first resolution proposed that the State of Wisconsin might account for the land not sold, which had been granted by the said act of 1838, to aid in the construction of the Lake Michigan and Rock River Canal, as a part of the quota of five hundred thousand acres, granted by act of Congress of 4th September, 1841.

The second proposed, in conformity with the article of the

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constitution above cited, that the five hundred thousand acres before described, and also the five per centum of the net proceeds of public lands in the State, shall be appropriated for the support of schools, instead of roads and canals, as originally proposed by Congress.

The foregoing acts show the legislation of Congress as to the canal-grants of the act of 18th of June, 1838, to the Territory and the State of Wisconsin, and the terms and conditions proposed and finally accepted and agreed between the United States and the people of Wisconsin, upon which the State of Wisconsin has been admitted into the Union.

The Commissioner of the General Land Office entertained the opinion that not only the quantity of 13,569.18 acres, which had remained unsold, but also the quantity of 125,431.82 acres of land, which had been sold under the laws of the Territory of Wisconsin, the proceeds whereof were applied towards the abortive project of the canal company for uniting the waters of Lake Michigan and the waters of Rock river, making together the quantity of one hundred and thirty-eight thousand nine hundred and ninety-six acres, (138,996,) ought to be deducted out of the quantity of 500,000 acres of land accruing to Wisconsin by the act of 4th September, 1841, upon her being admitted into the Union. This was resisted by the State.

Question, thereupon, was submitted by the Secretary of the Interior to Attorney General Crittenden, who, according to his opinion of 24th of July, 1852, deemed it proper to deduct the unsold lands out of the said grant of 500,000 acres, because of the terms as to that part contained in the act of 1848. But as to the residue, which had been sold by Wisconsin, his opinion was, that "it ought not to be taken, deducted from, or computed as any part of, the said five hundred thousand acre grant; that, the canal not having been completed within the prescribed period of ten years, Wisconsin has become liable and bound, by express and repeated provisions of law, to pay to the United States the whole amount of money received by her for the lands sold, and that the executive officers of the Government have no authority to cancel this pecuniary obligation of Wisconsin, by

taking land from her in satisfaction, and to deduct the quantity of land sold by her out of the 500,000 acres, to which she would be otherwise entitled." (Ante, vol. v, p. 574.)

Since that opinion was given, the accounting officers of the Treasury have charged the State of Wisconsin with the sum of \$313,579.55 for 125,431.88 acres, sold under the act of 1838, the proceeds of which were vested in the canal stock, and rated at the lowest price affixed by the act of 1835, two dollars and fifty cents per acre.

As a credit to this sum of \$313,579.55, the officers of the Treasury propose to apply the sum of \$6539.34, due to the State from the five per centum on sales of the public lands in Wisconsin. This set-off is resisted by the State.

When we proceed now, upon a careful review of the whole matter, to inquire deliberately what are the relative obligations and rights of the State of Wisconsin, and of the United States, in the premises, the salient fact in the case, is the condition inserted as well in the act of Congress of 1848 as in that of 1847, that "the liabilities, incurred by the territorial government of Wisconsin under the act of 1838," "shall be paid and discharged by the State of Wisconsin;"—which liabilities are not specially set forth in the acts of 1847 and 1848, but are described by reference only to the act of 1838;—which the officers of the Treasury assume to be the "amount of all moneys received" by the Territory "upon the sale of the whole or any part of said land, at the price at which the same shall have been sold, not less than two dollars and fifty cents per acre;" and which the same officers assume to be the sum for which, by the act of 1838, it is enacted "that the said State of Wisconsin shall be held responsible to the United States, and for payment into the Treasury thereof," provided the said canal shall not be commenced within three years and completed within ten years, according to the charter granted to the canal company by the Territory, and approved by Congress.

Whether it be a true construction of the acts to assume that the "liabilities" imposed on the State of Wisconsin by the acts of 1847 and 1848 are thus definitely fixed in amount, by refer-

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ence to the act of 1838, is a question to be made the subject of remark hereafter.

Next to this fact, the most noticeable one is, that Congress made no mention whatever of these liabilities, when, by the act of 1846, it proposed to the State of Wisconsin that five per cent. of the net proceeds of the sales of public lands lying within the State, which had been or might be sold by Congress, from and after the admission of the State into the Union, should be paid to the State "for the purpose of making roads and canals in the same," under the direction of the legislature. The payment of those liabilities by the State was required only when Congress was requested by the State to apply the five per cent. to schools instead of roads and canals, and as the condition of assenting to that modification of the proposition made by Congress.

It is not very apparent why this condition was made in the latter instance, and not in the former. Perhaps it was an after-thought, and Congress took advantage of the opportunity afforded it, by the counter proposition of the State, to secure this point. Or, possibly, Congress may have conceived that, so long as the five per cent. was appropriated to roads and canals, it might operate the more undeniably as a fund out of which to discharge the subsisting canal obligations of the Territory or State.

The question of set-off, in the present case, would be a very different one, if the five per cent. continued applicable to roads and canals.

For, in the actual case, the assumption is, that the executive officers of the United States may apply the proceeds of a specific fund, appropriated by compact to a specific object, (the support of schools in Wisconsin,) to a different object, (the payment of a debt raised upon the books of the Treasury against the State of Wisconsin.) Viewing these matters as if they were the single acts of the Government of the United States, not complicated with the negotiations between the Government of the United States and the government of Wisconsin, and their mutual agreements,—the diversion of money appropriated to one specific object, to another and different purpose, defeat-

ing the end and object of the appropriation, would appear questionable, unless done by express authority of an act of Congress.

We have seen that Mr. Crittenden denied, in his opinion already cited, the power of the executive officers of the United States to commute a debt, due in money by the State of Wisconsin to the United States, into lands, and to commute into money an obligation from the United States to the State of Wisconsin for lands. He did not think there was competent authority so to transact the business and regulate the interests of the two Governments.

The doubtfulness of the assumed authority of set-off, in the present affair, is further suggested by the fact, that Congress deemed it necessary to make special provision for set-off, in the case of stocks of the States, held in trust by the United States.

The joint resolution, approved March 3d, 1845, (v Stat. at Large, p. 801, no. 14,) declares "that whenever any State shall have been or may be in default for payment of interest or principal, on investments in its *stocks or bonds held* by the United States *in trust*, it shall be the duty of the Secretary of the Treasury to retain the whole or so much thereof as may be necessary, of the per centage to which such State may be entitled of the proceeds of the sales of the public lands within its limits, and apply the same to the payment of said interest or principal, to the reimbursement of any sums of money, expended by the United States for that purpose."

The terms of this resolution do not apply to the present case, so as to authorize the proposed set-off; because the United States do not hold in trust any bonds of the State of Wisconsin, but merely an unliquidated claim against the State. And, if an act of Congress be needed in order to give the power of set-off, in the case of bonds, or the interest upon them, due the United States, *a fortiori*, it would seem to be needed in the case of a mere unliquidated claim on a State, on account of a debt of a Territory assumed by that State.

Such an act of Congress, in the cases to which it applies, relieves the question of another inherent difficulty arising out

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of the special arrangements between the United States and the State of Wisconsin.

While, by the tenor of those arrangements, the United States agreed, conditionally, to pay over to the State of Wisconsin five per centum of the net proceeds of the sales of the public lands in the State of Wisconsin, as a fund for the support of schools within the State, on its side the State of Wisconsin agreed to receive that fund so appropriated, and to use it in support of schools, and for no other purpose.

If the State of Wisconsin should voluntarily apply that fund in paying the general expenses and charges of her civil list, and by way of lessening the necessary taxes for the support of the Government, or for payment of her debts contracted in unprofitable engagements in canals, to the neglect of schools, that would be, on the part of the State, a breach of trust, and a violation of good faith on her part. The practical effect is the same, that is, a trust fund is applied to the payment of a general debt, if the proposed set-off be made by the United States. This may be properly done by authority of an act of Congress, as in the cases provided for by the joint resolution of 1845: it does not follow that it can be done without, and on the mere discretion of the accounting officers of the Treasury.

Moreover, the hypothesis of set-off rests on the basis of an account stated at the Treasury, in which the State of Wisconsin is made the debtor to a given amount. But such a settlement is *ex parte*. It charges the State of Wisconsin upon principles assumed by the accounting officers of the Treasury. Neither the adjustment of the account, nor the conditions of adjustment, have been directly prescribed by Congress.

Undoubtedly, the 6th section of the act of 1838, referred to by the act of 1847 and 1848, affords, *prima facie*, a rule of damages in the case, since it holds the State "responsible to the United States and for payment into the Treasury thereof," of a defined amount of money, assumed to have been received by the Territory.

But, on the other hand, it is to be observed that various equities enter into the ultimate question.

In the very act, which creates the original responsibility of

the State on account of the proposed canal, Congress reserved interest and benefits therein to the United States ; it directed and required the then Territory and future State of Wisconsin, to become a stockholder in the corporation, to which it authorized the proceeds of the lands granted, to be delivered ; the Territory was empowered to borrow, upon the pledge of those lands, money to be invested in the work ; and it undertook to regulate the tolls until the time when the canal should pass into the hands of the State.

Meanwhile, the project of the canal, so useful in promise, and therefore so much encouraged by Congress, and which it, in many respects, adopted and made its own, having fallen through, and the question recurs, what, under all the circumstances, are "the liabilities" in the premises "incurred by the territorial government of Wisconsin?"

It may be pertinent, at some time, to inquire whether the phrase, "liabilities incurred by the territorial government," does, in truth, describe the same identical thing as the phrase, "money, for which the said State of Wisconsin shall be held responsible," and whether the "liabilities" spoken of are or are not other than, or in addition to, the pecuniary obligations of the Territory to the United States.

Suffice it to say now, that it does not seem just and equitable that the State of Wisconsin should be held exclusively responsible for losses incurred by a corporation, to which the lands went by the express authority of the United States, and through an enterprise of hopeful inception, a beneficial interest in which was reserved to the United States,—that is, that all the risk of the abortive undertaking should be held as devolving on the Territory. Such has not been the course of the Government in regard to other enterprises of the same class.

I incline to think that the true view of the subject, after all, is this :

Congress, in providing to enable the people of Wisconsin Territory to form a constitution as a State, submitted to the constitutional convention, to be assembled in Wisconsin, five propositions, which, if ratified as a part of the constitution of the State, were to be obligatory on the United States.

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Wisconsin accepted these propositions as binding upon her, and not revocable by her separate act, nor without the consent of Congress. At the same time, that is, in the same constitutional act, Wisconsin provided for important departures from these propositions, and for a different appropriation of two land grants, including the five per centum, "if Congress shall assent to such appropriation." And in the five propositions appended to the constitution, Wisconsin expressly desired Congress to accept these in place of the original propositions.

Under these circumstances, it is obvious that the original propositions of Congress, though, by the acceptance of Wisconsin, they had become obligatory on the State, and also on the United States, if the State chose so to consider it, had ceased to be obligatory on the United States, if the latter so chose, inasmuch as Wisconsin, by express declaration of its desire, and that in the body of the constitution as well as in the resolutions, had conditionally released the United States from their obligation, and solicited them to enter into a new and substitute-arrangement with the State.

If the United States had refused their assent to the proposed change, then the original propositions would have stood accepted and obligatory on both sides. But the United States consented to the changes requested, with conditions; and one of the conditions was, the State should pay and discharge certain canal liabilities of the Territory.

Now, it cannot be pretended that the people of Wisconsin were subject to any misapprehension as to the conditions on which the counter-propositions of the State were to be acceded to by the United States; for, in the act of 1847, Congress presented to Wisconsin the precise idea as the condition of the assent of the United States to the change of destination, proposed by Wisconsin to be given to the five per cent. land grant; and when, at the second convention, Wisconsin requested anew the same modifications in the propositions of 1846, it was with perfect knowledge of the views of that subject entertained by Congress.

The matter in effect stands thus: The United States proposed to Wisconsin, among other things, to grant to her five per

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centum of the net proceeds of certain land sales, for the purpose of aiding in the construction of roads and canals within the State. To this, the State of Wisconsin replied, accepting the proposition, but under express reservation and qualification of special request to the United States to modify the original propositions in a certain degree and manner. To this the United States rejoined, by assenting to the proposed modification, under condition, however, that the liabilities of the Territory, on account of the abortive canal project, shall be paid and discharged by the State. Whereupon, each government proceeded to execute and perform all the parts of the arrangement as thus at length concluded, except that, so far as appears, the State has not yet performed and executed the condition, on her part to be performed and executed, of paying and discharging the above-mentioned liabilities of the Territory.

It is impossible for me to regard this arrangement in any other light than as a synallagmatic contract between the United States and the State of Wisconsin, wherein certain things are stipulated to be done by the former, on the consideration of certain things being done by the latter, and not otherwise. The United States grant only on condition of payment by Wisconsin. If Wisconsin refuse to pay, there ceases to be obligation to grant on the part of the United States.

The fact, that, for several years, the United States went on to perform, while the State did not, is of no avail to discharge the latter; it constitutes no waiver, in law, of the rights of the United States; on the contrary, without weakening the legal obligation, it strengthens the moral one, incumbent on the State.

My opinion, therefore, is, not that the officers of the Treasury have the right to charge the five per centum in set-off against the canal debt, and so in fact to apply school-fund money to the liquidation of the canal fund, but that it is the right of the United States to refuse to pay over the five per centum, and to continue to hold the same in trust itself, until an adjustment be had of the liabilities of the State.

While the present State of Wisconsin was a Territory, that is, in a condition, in some respects, of minority, the United

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States, in conceding to the Territory the means of constructing a proposed canal for the common benefit of the Territory, and of the United States, imposed on the Territory sundry obligations. Out of that transaction a territorial debt arose, which the State has been required to assume.

But the amount of that debt, whether it be to the United States alone, or to third persons, the principles upon which it shall be liquidated, and the time or manner of payment, are points, which have not been determined by any concerted act between the United States and the State.

The present fact is not a case of indebtedness originating in the Treasury, but of unliquidated demand by the United States against one of the States. The several States of the Union have not so lost their political powers and sovereignty as to be subject to a final judgment of indebtedness, in fact and in amount, by the mere decision of the accounting officers of the Treasury. Such demands are fit subjects of negotiation in the first instance, between the two governments, that of the United States and of the given State. If such negotiation should not produce an amicable and satisfactory adjustment, then it is for the wisdom of Congress to direct what shall be done.

It seems to me, in the present case, that such a course should be pursued to ascertain and fix the amount, which the State of Wisconsin shall pay, in discharge of this, its obligation to the United States; that the attention of the State should be respectfully invited to the subject; that until further consideration thereof all definite action should be suspended; and that, meanwhile, the five per centum, of the net proceeds of the public lands sold in the State, may be retained in the Treasury of the United States.

I am, very respectfully,

C. CUSHING.

Hon. ROBERT McCLELLAND,
Secretary of the Interior.

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RECIPROCITY TREATY WITH GREAT BRITAIN.

Under the treaty between the United States and Great Britain of June 5th, 1854, the President cannot issue his proclamation giving effect to the treaty as to Canada alone in anticipation of the action of New Brunswick, Nova Scotia, and Prince Edward's Island; nor until he shall have received evidence, not only of the action of those Provinces, but also of the Imperial Parliament.

ATTORNEY GENERAL'S OFFICE,

October 3, 1854.

SIR: Your communication of the 2d instant propounds inquiry as to the legal effect of certain provisions of the treaty between the United Kingdom of Great Britain and Ireland and the United States of America, concluded and signed by the plenipotentiaries of the two Governments on the 5th of June last.

That convention was duly ratified by both Governments, and thus became complete and perfect as a treaty, to be observed and fulfilled in good faith, the same and every clause and article thereof, as well by the United States as by the United Kingdom; and on the 11th of September last it was proclaimed accordingly, in due form, by the President.

This official act was performed in obedience to the Constitution, and in accordance with the rules observed in the practice of the Government from its foundation to the present day.

But, in this treaty, as in many others, are provisions, which require preliminary things to be done before those provisions can have their full execution. The treaty binds the good faith of each Government to endeavor to have the requisite preliminary things done, and so far, in regard even to the provisions of imperfect or prospective execution, the treaty has full effect at once, by making the stipulations as to that point obligatory at once upon both Governments.

Numerous examples of this particular fact occur in all the diplomatic history of the Government. Thus, the several boundary treaties require the performance of acts both legislative and executive, as preliminary to the actual demarcation of the new line, and the determination of private rights dependent

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thereon; and so it is in the case of treaties, which make provision for the payment of indemnities. In a word, a treaty, when proclaimed, is so far forth the law of the land, to be respected as such, although, as in the case of many laws of a merely municipal character, some of the provisions thereof may be contingent or executory only.

On examination of the present treaty, it is perceived that some of its articles are of such nature as to be susceptible of execution, at least *de bene esse*, forthwith, by their own proper vigor, requiring no preliminary act to be performed on either side as antecedent to such execution, save mere formal orders of the executive authorities of each Government.

Of this class are the reciprocal stipulations for the liberty assured to the inhabitants of the United States in common with British subjects, to take fish in certain waters on the coast of the British Provinces in North America, and to British subjects to take fish in the waters of certain parts of the coasts of the United States; as, also, the right assured to the inhabitants of the United States to navigate the river St. Lawrence in common with subjects of Great Britain.

But, in the same treaty, are to be found other stipulations, which provide for things to be done contingently only, upon the enactment of certain laws by the Imperial Parliament of Great Britain and the Provincial Parliaments on the one hand, and the Congress of the United States on the other; of which class are the stipulations for the admission of sundry enumerated articles, the growth and produce of the United States, or of the Provinces of Canada, New Brunswick, Nova Scotia, and Prince Edward's Island, into each country respectively, free of duty on importation.

This condition appears in the following words of the fifth article, viz.:

"The present treaty shall take effect as soon as the laws required to carry it into operation shall have been passed by the Imperial Parliament of Great Britain and by the Provincial Parliaments of those of the British North American Colonies which are affected by this treaty on the one hand, and by the Congress of the United States on the other."

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That is to say, while the treaty takes effect as a treaty, as a national compact between the two Governments, on its being proclaimed, yet certain of its provisions are not to have operation until the requisite laws, contemplated by the treaty, shall have been passed by the Provincial Parliaments, the Imperial Parliament, and the American Congress.

Of course, it became the duty of the Secretary of the Treasury to refuse to dispense with duties of customs on the importation into the United States of any of the articles of merchandise enumerated in the treaty, until the requisite legislation should have been had ; and it is not easy to conceive how the delusive idea should have attained currency in the United States, as it has done, that there is contradiction between the decision of the Secretary of the Treasury in this respect and the proclamation of the President.

Meanwhile, the Congress of the United States has done its part in the premises, by the enactment of a law, approved on the 5th of August last, the pertinent clauses of which are in the following words, viz. :

“Whenever the President of the United States shall receive satisfactory evidence that the Imperial Parliament of Great Britain, and the Provincial Parliaments of Canada, New Brunswick, Nova Scotia, and Prince Edward’s Island, have passed laws on their part to give full effect to the provisions of the treaty between the United States and Great Britain, signed on the fifth of June last, he is hereby authorized to issue his proclamation, declaring that he has such evidence, and thereupon, from the date of such proclamation, the following articles, being the growth and produce of said provinces of Canada, New Brunswick, Nova Scotia, and Prince Edward’s Island, to wit :

* * * * *

“Shall be introduced into the United States free of duty so long as the said treaty shall remain in force—subject, however, to be suspended in relation to the trade with Canada, on the condition mentioned in the fourth article of the said treaty ; and all the other provisions of the said treaty shall go into effect, and be observed on the part of the United States.”

No legislation in the premises has yet been had by the Impe-

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rial Parliament, nor, so far as yet known, by the Provincial Parliaments of New Brunswick, Nova Scotia, and Prince Edward's Island.

But, on the 23d of September last, a law was enacted by the legislature of Canada, the material part of which is in the words following, namely:

"1. Whenever the governor of this province shall by proclamation declare that the said treaty has taken effect according to the terms thereof, the articles enumerated in the schedule hereunto annexed, being the growth and produce of the said United States, shall be admitted into this province free of duty, &c.

"2. It shall be lawful for the governor and council, by any order or orders to be made for that purpose, to do anything which shall be found necessary to be done on the part of this province to give full effect to the said treaty, and any such order shall have the same effect as if the object thereof were expressly provided for by this act."

And the question submitted is, whether, upon the exhibition of an authenticated copy of said last-named act, the President has authority, under the act of Congress cited, to issue his proclamation, declaring that he has received satisfactory evidence that the Provincial Parliament of Canada has passed laws on its part to give full effect to the provisions of the treaty, so that thereupon the legal consequence shall ensue of the free importation of the enumerated articles, as between the United States and Canada alone, in anticipation of the proper legislation, not yet had, on the part of the Imperial Parliament and of the Provincial Parliaments of New Brunswick, Nova Scotia, and Prince Edward's Island.

The determination of this question requires that it be considered, first, in its relation to the Imperial Parliament; and, secondly, to the Provincial Parliaments.

It is not my purpose, in the discussion of this point, to enter into any debatable question or questions of mere political theory, as to the limits, supposititious or actual, between those acts of the British Crown, which it performs in virtue of recognised complete power of its own, and such acts as it may constitution-

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ally perform only in conjunction with, or by authority of, the Imperial Parliament. It will suffice to consider the subject on the premises of existing acts of the Imperial Parliament, as affording the most convenient practical indication of the relative powers of that and of the Crown.

The act of 8 & 9 Victoria, chap. 93, entitled "An act to regulate the trade of the British possessions abroad," applies throughout, either expressly or by manifest implication, to the several provinces of Canada, New Brunswick, Nova Scotia, and Prince Edward's Island. It defines what places therein, respectively, shall be ports of clearance and entry for foreign exportation or importation. It designates what articles of merchandise shall be deemed prohibited, or importable only under certain restrictions, and what articles may be free of duty of customs; and it enumerates the articles which may be imported subject to duty, prescribing the rate of duty chargeable on each. It enacts that all laws, by-laws, usages, or customs of any of the British possessions in America, which are in anywise repugnant to any act of Parliament made, or thereafter to be made, in the United Kingdom, so far as the same shall relate to and mention the said possessions, are, and shall be, null and void to all intents and purposes whatsoever; provided that no exemption from duty, in any of the British possessions abroad, contained in any act of Parliament, shall extend to any duty not imposed by act of Parliament, unless and in so far only as any duty not so imposed is or shall be expressly mentioned in said exemption. And the act further provides that it shall be lawful for the Queen, by order in council, to regulate the trade and commerce to and from certain of the British possessions abroad, which are specially mentioned, and are exclusive of those in America.

By the whole tenor, therefore, of this act, the regulation of duties of customs on merchandise imported into the colonies of Canada, New Brunswick, Nova Scotia, and Prince Edward's Island, from the United States, or any other foreign country, was declared to be the province of the Imperial Parliament.

But a most important change in this respect was introduced by the act of 9 and 10 Victoria, chap. 94, entitled "An act to enable the legislatures of certain British possessions to reduce

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or repeal certain duties of customs," which act is in the following words, namely:

"Whereas, by an act passed in the session of Parliament, holden in the eighth and ninth years of the reign of her present Majesty, entitled *An act to regulate the trade of the British possessions abroad*, certain duties of customs, set forth in a certain table in the said act contained, are imposed upon the importation into any of the British possessions in America, or into the island of Mauritius, of the several articles therein mentioned, not being the growth, produce, or manufacture of the United Kingdom, or of the British possessions therein enumerated, and a certain duty of ten pounds for every one hundred pounds of the value thereof is imposed upon the importation thereof of certain sugar refined in bond in the United Kingdom; and whereas, by the said act it is enacted that all laws, by-laws, usages, or customs, which shall be in practice, or endeavored or pretended to be in force or practice, in any of the British possessions in America, which are in anywise repugnant to the said act, or to any act of Parliament made or to be made in the United Kingdom, so far as such act shall relate to and mention the said possessions, are and shall be null and void to all intents and purposes whatsoever; and whereas, it is expedient to enable the legislatures or other proper legislative authorities in the said British possessions, with the assent of her Majesty in council, to reduce or repeal all or any of such duties of customs as aforesaid, so far as the same may be in force in such possessions respectively:

"I. Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal and commons in this present Parliament assembled, and by the authority of the same, That if and whenever the legislature or other proper legislative authority of any of the said British possessions in America or the Mauritius make or pass any act or ordinance, acts or ordinances, reducing or repealing all or any of the said duties of customs so imposed as aforesaid by the said recited act upon any articles imported into such possession, and if her Majesty, by and with the advice of her privy council, assent to such act or ordinance, acts

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or ordinances, such duties of customs shall, upon the proclamation of such assent in the colony, or at any time thereafter which may be fixed by such act or ordinance, be so reduced or repealed in such possession as if such reduction or repeal had been effected by an act or acts of the imperial legislature, anything in any act to the contrary thereof notwithstanding.

“II. And be it enacted, That all such acts and ordinances shall be laid before both houses of Parliament by one of her Majesty’s principal Secretaries of State within thirty days after her Majesty shall have assented thereunto, if Parliament be then sitting, or, if not, then within thirty days after the next meeting of Parliament.”

The existence of this act throws light on the clause of the treaty, which calls for legislation by the provinces. It seems that now, notwithstanding the tenor of the previous act above cited, the provinces of Canada, New Brunswick, Nova Scotia, and Prince Edward’s Island, are competent of themselves to repeal the existing duties on the importation therein of any of the articles enumerated in the treaty under consideration; that is to say, such repeal by them, if approved by the Queen, is competent and sufficient, as between them and the Imperial Government.

But, besides the mutual interchange of certain articles of merchandise free of duty between the United States and the provinces of Canada, New Brunswick, Nova Scotia, and Prince Edward’s Island, the treaty provides, as we have seen, for the common enjoyment of certain fisheries on the coasts of America, and the rights which citizens of the United States are thus to enjoy on the coasts of the British provinces are especially declared by the treaty to be in addition to those which were secured to them by the convention of 1818 between the two Governments.

Now, when that convention was concluded, it was deemed necessary for Parliament to pass an act to carry it into effect, that of 59 George 3, ch. 38. The act gives to the Crown power to make regulations applicable to the fisheries, according to the tenor of the convention; and it provides for the seizure and condemnation of vessels belonging to citizens of the United

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States found fishing on the coasts of British America in contravention of the same. It would seem that, by parity of circumstances, an act of Parliament is requisite, adapted to the present treaty relations of the two Governments, in this respect.

There is not, within my knowledge, any act of Parliament which yields to the Anglo-American provinces complete legislative jurisdiction of the coast fisheries, nor is it easy to see how there should be; for those fisheries are clearly of Imperial, not of Provincial, right; that is to say, they belong to all the subjects of the British Empire, not alone to the Anglo-American provinces.

Accordingly, the Earl of Clarendon, in his despatch to Mr. Buchanan of the 19th of August, apprising him of the Queen's ratification of the treaty, adds that "directions will have been sent to the British colonial and naval authorities not to molest American fishermen in using at once the privileges secured to them by the treaty;" thus dealing with it as a question of the jurisdiction of the Imperial Government.

It is not material, therefore, to consider and analyze what there may be of provincial legislation on the subject. Nor is it, in my judgment, material to inquire how far any modified or sub-right in these fisheries may have passed, by the political acts creating those provinces, from the British Crown to them and their inhabitants; for, after all, whatever concurrence or confusion of political right there may be in this respect as between those provinces and the Imperial Government, still they are but dependencies of the United Kingdom, or, if you please, integral parts of the British Empire, and of course the question of the coast fisheries, in its foreign relations, must, of necessity, be of the resort of the British Government.

Suggestions in the same sense might be made in regard to the question of the navigation of the river St. Lawrence, which, by an order of the Governor General of Canada of the 21st of August, was opened to the citizens of the United States.

It is notable in that order, however, that it does not assume to be permanent in its effect, but to operate only "pending the action of the Imperial and Provincial legislatures on the sub-

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ject," thus recognising the eventuality of legislation in the premises, for the permanent regulation of the matter, on the part of the Imperial Parliament.

And so, in fact, it must be with regard, also, to the question of duties of customs on importations of foreign merchandise in the British provinces. The British Government may well, if it see fit, by act of the Imperial Parliament, confer on the Anglo-American provinces legislative jurisdiction over those duties; but if it gave, it may take away; the function of those provinces is municipal, not international; and when the duties of customs come to be a question with any foreign state, negotiations regarding them must be conducted by the British Government itself, and all obligatory legislation concerning them must devolve, in so far as relates to that foreign state, upon the Parliament of the United Kingdom.

In the case of the present treaty, it is stipulated between the high contracting parties that, before it shall take full effect, certain laws shall be enacted by the Provincial Parliaments of Canada, New Brunswick, Nova Scotia, and Prince Edward's Island; but that stipulation is entered into not for any object of the United States, but for purposes of the domestic policy of the British Government in its relation to those provinces. In like manner the Federal Government, if it had seen cause, might have proposed a correspondent stipulation, in regard to its coast fisheries; for instance, that the treaty should take effect as to that matter only on condition of certain laws being enacted by the legislative assemblies of such of the several States of the Union as are specially affected by that part of the treaty, in having their coast fisheries thrown open to the subjects of the United Kingdom. But, if such a stipulation had been proposed, it would have been for considerations appertaining to the relation of the Federal Government to the individual States of the Union, and not on account of any relation of theirs to the United Kingdom.

In a word, the pivot of the whole inquiry is the cardinal fact that, when government comes to deal with government, the United States know the United Kingdom alone, and the United Kingdom knows only the United States. We enter into a con-

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vention; we bind ourselves by solemn treaty; and if, by reason of the internal constitution of either Government, legislative action on either side be necessary in order to the execution of any of its stipulations, or in order to secure their permanent efficiency, that ultimate and essential legislation must emanate from the Imperial Parliament of the United Kingdom and from the Congress of the United States.

In accordance with this fundamental idea is the language of the treaty; for it sets forth that the treaty shall take effect as soon as the laws required to carry it into operation shall have been passed, not merely by the Provincial Parliaments, but also by the Imperial Parliament of Great Britain as well as by the Congress of the United States. It is not material what those laws, to be passed by the Imperial Parliament, are; nor whether they are of more or less moment; nor whether that condition was inserted at the instance of the British or of the American Government. We may conceive that both shall have desired it, for the reason that they, being the contracting parties, should have looked at the propriety of having all the provisions of the treaty endowed with legislative completeness, by the highest political authority on each side, in a full exercise of its legislative and political sovereignty. Independently of which, Great Britain may have said or felt that, however much the stipulations of the treaty affected the provinces immediately, yet, nevertheless, they also affected most evidently the aggregate British Empire itself; and that, therefore, it was well for the Crown to reserve the right of subjecting certain of the provisions of the treaty to the legislative ratification of the Imperial Parliament. On the other hand, the United States may well have said or felt that, whereas the treaty could not take effect until after certain of its provisions should have received the sanction of Congress; and whereas the United States had thus bound themselves, not only by the action of their treaty-making powers, the President and the Senate, but also by that of their law-making powers, the Senate and House of Representatives, therefore we should expect and require the assurance of engagements entered into in like manner by the supreme executive and legislative powers of the British Empire.

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The foregoing considerations, if not in themselves conclusive as arguments bearing on the mere language of treaty, construed in the light of the political organization of the two Governments of the United States and of Great Britain, yet seem to derive irresistible force from the language of the act of Congress. This provides that certain articles, being the growth and produce of the provinces of Canada, New Brunswick, Nova Scotia, and Prince Edward's Island, shall be introduced into the United States free of duty upon the precedent occurrence of a certain act, namely, the official declaration of the President of the United States that he has received satisfactory evidence of specified facts. Now, one of these facts circumstantially set forth in the act of Congress, as requiring to be verified by the President, and certified by him on his high official responsibility, is, that the Imperial Parliament of Great Britain has passed laws on its part to give full effect to the provisions of the treaty in question between the United States and Great Britain. How is the President to verify this fact? Would the opinion of the Secretary of State or the Attorney General of the United States, that no particular act of the British Parliament seemed indispensably necessary in the premises, or that subsisting acts of Parliament appear to be sufficient for the purpose, or that certain legislative acts of the British provinces may probably meet the immediate administrative exigencies of the case,—would such an opinion of those officers of the Federal Government constitute that satisfactory evidence, which the conscience of the President demands, to the effect that the Imperial Parliament has passed laws on its part to give full operation to the provisions of the treaty? Can any conceivable construction or legal exposition of acts of the Imperial Parliament antecedent to the treaty correspond to that exigency of the conscientious obligation of the President? Is it not the manifest and only admissible intendment of the act of Congress, that the laws passed by the Imperial Parliament to give effect to the treaty, and of the passage of which the President is to have satisfactory evidence, are the laws to be passed by the Imperial Parliament now, laws to be specially enacted for the definite and precise object of giving effect to this treaty *eo nomine*, just like this act

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of Congress itself? Such, after the most mature and solicitous reflection upon the subject in all its bearings, seems to me to be the inevitable force and effect of the language of this act of Congress.

I come now to the consideration of another branch of the inquiry referred to me, namely, the question whether, supposing no other difficulties to stand in the way, it would be lawful to give effect to the treaty provisions of reciprocal free trade between the United States and Canada upon receiving satisfactory evidence that the Provincial Parliament of Canada alone had passed the laws required on its part to be passed, the Provincial Parliaments of New Brunswick, Nova Scotia, and Prince Edward's Island, not having yet acted in the premises.

It is true this question becomes of less importance when it shall have been decided that specific action of the Imperial Parliament is the indispensable prerequisite condition to the issue of his proclamation by the President of the United States. But, inasmuch as the Province of Canada has, with commendable promptitude, passed an act which disposes expressly of the part of the subject relating to duties of customs, and which vests in the Governor and council authority to do, by order equivalent to law, anything else which may be found necessary to be done on the part of the province to give full effect to the treaty;—and inasmuch as grave interests on both sides, as well in the United States as in Canada, urge the immediate fulfilment of the treaty in this respect;—and inasmuch as this object has been authoritatively pressed on the Government by special representation of the Canadian Government;—hence it is proper to lay before you briefly the views which occur to me respecting this branch of the general inquiry.

In the first place, the treaty, in prescribing action by the Provincial Parliaments of Canada, New Brunswick, Nova Scotia, and Prince Edward's Island, speaks of them together. It contains no phrase of distinction or even particle of disjunction. It says the "Provincial Parliaments," not the Provincial Parliaments or *either of them*. It supposes the treaty to have effect in the provinces as a whole, not in one or more of them in successive stages as they may severally act. It is to have

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effect in regard to each of the distinct things which it disposes of,—the fisheries, the river navigation, and reciprocal free trade,—with completeness as to each several class of things. Such appears to be the force of the language employed in the fifth article of the treaty.

A similar conclusion seems to arise on the language of the act of Congress, in which the four Provinces are spoken of together, without any phrase being employed to authorize them to be treated with separately. Besides which, any other construction of the act would involve the necessity of the issue of several proclamations by the President, as each successive province should, by its legislation, become entitled to the benefits of the treaty. But the act speaks of only one proclamation, and does not seem to have contemplated the contingency of a plurality of proclamations.

The inferences deducible from the language of the fifth article of the treaty, and of the act of Congress, are confirmed by the fact of separate provision being made in the sixth article for the island of Newfoundland. If it was the intention that the several provinces might be dealt with separately, and the provisions take effect in regard to each one of them when it should legislate, it would not have needed to make this separate arrangement for Newfoundland; for each and all of the provinces might, in that case, have been enumerated in the same article, with condition that the treaty should take effect in regard to them, or to either of them, upon the enactment of the requisite laws by the Provincial Parliaments of each respectively, and by the Imperial Parliament.

My opinion, upon the whole inquiry, then, is, that the President cannot lawfully issue his proclamation, until he shall receive satisfactory evidence of the enactment by the Imperial Parliament and by the Provincial Parliaments of all the four provinces of Canada, New Brunswick, Nova Scotia, and Prince Edward's Island, of special laws *ad hoc* to give full effect to the treaty, according to the terms of the act of Congress.

I am, very respectfully,

C. CUSHING.

Hon. WM. L. MARCY,
Secretary of State.

International Extradition.

INTERNATIONAL EXTRADITION.

Evidence of the forging of checks on the communal chest of Breslau, in Prussia, is sufficient cause for the issue of a warrant for judicial inquiry with a view to the extradition of the party, under the treaty between the United States and Prussia.

ATTORNEY GENERAL'S OFFICE,

October 7, 1854.

SIR: I have examined the documents accompanying the communication addressed to you this day by the Baron Von Grabow, Chargé d'Affaires of Prussia, requesting the institution of process for the arrest and extradition of one Richard Sachs, a Prussian subject, charged as a fugitive from the justice of that kingdom.

These documents consist of the procès-verbal of testimony taken before the proper criminal tribunal of Breslau, in the kingdom of Prussia, and a warrant of arrest in due form from the said judicial authorities, together with other papers, the same being authenticated by the certificate of the Foreign Office of Prussia and that of the American Minister there.

From these papers it appears that said Sachs is charged, among other things, with forging sundry checks, by means of which, whilst an employe of the communal chest of Breslau, he obtained and absconded with a considerable sum of money belonging to said communal chest.

These facts being proved, will constitute, it is clear, the crime of forgery, if nothing else, which is one of the crimes for which the mutual extradition of fugitives of justice is stipulated by the convention between Prussia and the United States, of the 16th of June; and the documents are sufficient, in my opinion, to justify the granting of the customary mandate in such cases on the part of the President.

I am, very respectfully,

C. CUSHING.

Hon. WM. L. MARCY,
Secretary of State.

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